89-911

No. 89-

Supreme Court, U.S.
FILED
DEC 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CONSOLIDATED OIL & GAS, INC.,
Petitioner,

v.

SOUTHERN UNION COMPANY

and

FEDERAL ENERGY REGULATORY COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALLEN R. SNYDER
WALTER A. SMITH, JR.*
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5728

RICHARD G. MORGAN
JAMES L. MARKETOS
LANE & MITTENDORF
919 18th Street, N.W.
Washington, D.C. 20006
(202) 785-4949

* Counsel of Record

Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a lower federal court may redetermine a federal question already finally resolved by a state supreme court and countermand that state court's orders.

PARTIES TO THE PROCEEDINGS

In the court below, Southern Union Company was the petitioner, the Federal Energy Regulatory Commission was the respondent, and Consolidated Oil & Gas, Inc., was the intervenor. As required by Rule 28.1, Consolidated Oil & Gas, Inc., states that it has two affiliates: Columbus Energy Corp. and Consolidated Energy Partners.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. The Nature of the Controversy	3
B. The State Court Proceedings	4
C. The Federal Court Proceedings	7
D. Attempts to Resolve the Conflict between the State and Federal Courts	9
REASONS FOR GRANTING THE WRIT	11
CONCLUSION	17
APPENDICES	
Appendix A: Opinion of the United States Court of Appeals for the District of Columbia Circuit	1a
Appendix B: Orders of the Federal Energy Regulatory Commission	14a
–Order Responding to Judicial Referral and Petition for Declaratory Order	14a
–Order Denying Rehearing and Motion for Consolidation and Hearing	26a

TABLE OF CONTENTS—Continued

		Page
	–Declaratory Order	40a
	–Order Denying Rehearing	54a
	–Order Reaffirming and Clarifying Prior Orders	57a
Appendix C:	Decision of New Mexico Supreme Court	67a
Appendix D:	Mandate of the New Mexico Supreme Court and order denying motion for rehearing and relief from judgment	81a
Appendix E:	Order of the District Court of Santa Fe County, New Mexico, Referring Issues to FERC	83a
Appendix F:	Decision of the District Court of Santa Fe County, New Mexico	85a
Appendix G:	Judgment of the United States Court of Appeals for the District of Columbia Circuit	93a
Appendix H:	Court of Appeals Order denying petition for rehearing	95a
Appendix I:	Court of Appeals Order denying petition for rehearing *en banc*	96a
Appendix J:	Dissenting opinion from order denying petition for rehearing *en banc*	98a
Appendix K:	Pertinent provisions of the Natural Gas Act of 1938 and Natural Gas Policy Act of 1978	99a

TABLE OF AUTHORITIES

Cases Page

Adams v. *United Steelworkers of America*, 97 N.M. 369, 640 P.2d 475 (1982) 15
Allen v. *McCurry*, 449 U.S. 90 (1980) 12, 14
Arkansas Louisiana Gas Co. v. *Hall*, 453 U.S. 571 (1981) ..... *passim*
Atlantic Coast Line R.R. Co. v. *Brotherhood of Locomotive Eng'rs*, 398 U.S. 281 (1970) 13
Chevron U.S.A., Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 16
Commodity Futures Trading Comm'n v. *Shor*, 478 U.S. 833 (1986) 16
D.C. Court of Appeals v. *Feldman*, 460 U.S. 462 (1983) 12, 13, 14
England v. *Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964) 12
Fritz v. *FERC*, 876 F.2d 1224 (5th Cir. 1989) 11
Hoag v. *New Jersey*, 356 U.S. 464 (1958) 13
Japan Whaling Ass'n v. *American Cetacean Soc'y*, 478 U.S. 221 (1986) 13, 14, 15
Kremer v. *Chemical Constr. Corp.*, 456 U.S. 461 (1982) 13, 15
Marrese v. *American Academy of Orthopedic Surgeons*, 470 U.S. 373 (1985) 15
Matsu v. *Chavez*, 96 N.M. 775, 635 P.2d 584 (1981) 16
Mississippi Power & Light Co. v. *Mississippi*, 108 S. Ct. 2428 (1988) 16
Montana v. *United States*, 440 U.S. 147 (1979) 13, 14
Pan American Petroleum Corp. v. *Superior Court of Delaware*, 366 U.S. 656 (1961) 12
Pennzoil Co. v. *Texaco, Inc.*, 481 U.S. 1 (1987) 13
Rooker v. *Fidelity Trust Co.*, 263 U.S. 413 (1923) 13
Southern Natural Gas Co. v. *Fritz*, 523 So.2d 12 (Miss. 1987), *cert. denied*, 110 S. Ct. 232 (1989) 11, 12

TABLE OF AUTHORITIES—Continued

Agency Cases	Page
Southern Union Co., 35 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,359 (June 19, 1986)	5, 16
Southern Union Co., 39 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,212 (May 27, 1987)	5, 16
Southern Union Co., 41 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,203 (Nov. 20, 1987)	6, 16
Statutes	
28 U.S.C. § 1254(1) (1982)	2
28 U.S.C. § 1738 (1982)	14
Natural Gas Act of 1938, 15 U.S.C. §§ 717-717z (1988)	2, 16
Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432 (1988)	2, 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-

CONSOLIDATED OIL & GAS, INC.,
Petitioner,

v.

SOUTHERN UNION COMPANY

and

FEDERAL ENERGY REGULATORY COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Consolidated Oil & Gas, Inc., petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 857 F.2d 812 and is reprinted in the Appendix to this Petition ("App.") at 1a. The prior, conflicting opinion of the New Mexico Supreme Court is reported at 749 P.2d 1098 and is reprinted at App. 67a. The pertinent Orders of the

Federal Energy Regulatory Commission, which were effectively approved by the New Mexico Supreme Court but disapproved by the D.C. Circuit, are reported at 35 FERC (CCH) ¶ 61,359, 39 FERC (CCH) ¶ 61,212, and 41 FERC (CCH) ¶ 61,203, and are reprinted at App. 14a.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on September 23, 1988. App. 93a. That court's orders denying a timely filed petition for rehearing or rehearing *en banc* were entered on September 12, 1989. App. 95a, 96a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C. § 1738 provides in pertinent part that "[t]he . . . judicial proceedings of any court of any . . . State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . ."

Pertinent provisions of the Natural Gas Act of 1938, 15 U.S.C. §§ 717-717z ("NGA"), and the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432 ("NGPA") are reprinted in Appendix K to this petition (App. 99a-118a).

STATEMENT OF THE CASE

This case concerns a lower federal court purporting to redecide a matter *already finally decided* between the parties in prior state court proceedings. The federal court's action not only contravenes fundamental principles of jurisdiction and comity announced by this Court, but it has produced an untenable result those principles were designed to prevent—state and federal courts issuing directly contradictory orders to the parties.

A. The Nature of the Controversy

Consolidated Oil & Gas, Inc. ("Consolidated") is a small gas producer in New Mexico, Texas, and Oklahoma, as well as several other States. In the 1950s and 60s, Consolidated entered a number of contracts to sell gas to Southern Union Company ("Southern"), a reseller of gas in both interstate and intrastate markets. The contracts all contained what is known as a "most favored nations" clause, requiring Southern to pay Consolidated the highest amount it paid other producers for the same product. App. 2a-3a, 70a, 88a.

In 1974, Consolidated and a number of other producers filed a breach of contract suit against Southern in a New Mexico State district court, alleging that Southern had failed to pay the higher prices for certain intrastate gas sales required by the most favored nations clause. While that suit was pending, the parties in 1976 entered into a Settlement Agreement which provided both for higher prices to be paid Consolidated under its contracts with Southern and for a lump sum to be paid Consolidated to compensate for past sales. In return for these arrangements, Consolidated relinquished its suit against Southern. App. 3a, 15a, 72a, 89a.

Southern shortly thereafter refused to pay the Settlement Agreement prices under certain of its contracts with Consolidated, on the ground that those contracts concerned interstate gas which was subject to price regulation by the Federal Energy Regulatory Commission ("FERC" or "the Commission"). Because Southern had represented in writing during the settlement negotiations that the disputed contracts were for intrastate gas, not interstate gas, Consolidated brought suit to enforce the terms of the Settlement Agreement and/or to recover damages for Southern's misrepresentation. It is that suit which has given rise to contradictory state-court and federal-court determinations, and has led to the present petition.

B. The State Court Proceedings

In 1979, Consolidated brought its suit in the New Mexico State district court for breach of the Settlement Agreement and for misrepresentation.[1] Southern denied liability, and in March 1980 petitioned FERC to exercise primary jurisdiction over the case, and moved the New Mexico court to stay its proceedings pending FERC's resolution of the matter. The court denied the stay, but referred to FERC both the question of primary jurisdiction and the applicability of federal price ceilings to the disputed contracts in question. App. 83a-84a.

In response to Southern's petition and to the state court's questions, FERC determined that the disputed contracts were in fact subject to federal ceilings, but expressly "declined to exercise jurisdiction over any other issues involved in the state court proceedings," including whether tort damages would be permissible. App. 35a. FERC determined that if such damages were awarded by the state trial court, FERC could at that point address their permissibility. App. 23a-25a.

Following a bench trial, the state court concluded that during the settlement negotiations Southern had in fact misrepresented that the contracts at issue were for intrastate gas, when in reality they were for interstate gas, and that the misrepresentation had significantly damaged Consolidated.[2] The court assessed Consolidated's

---

[1] Consolidated's original suit was only for breach of the Settlement Agreement; it subsequently amended the suit to add claims for fraud and negligent misrepresentation.

[2] Specifically, the court found: that Southern operated two parallel underground pipelines in New Mexico, one for intrastate resales and one for interstate resales; that it "possessed the sole ability" to determine which pipeline would be used for purchases from a given producer; that it could "easily and unilaterally switch a producer's well from one pipeline to the other"; that it knew of the destination for the gas purchased from Consolidated under the disputed contracts; that Consolidated itself had no independent knowl-

damages as approximately $11 million, equal to the additional $8.5 million Consolidated would have received under the Settlement Agreement had the representations been true, plus $2.5 million interest.[3] The court entered its decision awarding this amount on July 12, 1985. App. 92a.

Following the state trial court's decision, Southern petitioned FERC to issue a declaratory order holding that the agency's statutory authority to regulate interstate gas rates precluded the tort damages awarded by the state court. On that same basis, Southern simultaneously appealed to the New Mexico Supreme Court.

In a June 19, 1986 Order, FERC rejected Southern's position, concluding that the damages awarded for the negligent misrepresentation "do not violate the maximum lawful price provisions of the NGPA." App. 49a. It denied rehearing of that decision on May 27, 1987. App. 54a-56a.

---

edge of that destination; that the difference between the interstate and intrastate rates of the sales was significant due to the federal price ceilings on interstate sales; that during the settlement negotiations Consolidated relied on Southern's representation that the disputed contracts were entitled to the higher intrastate rate; that Southern knew or should have known that the representation was false; that Southern breached its duty to provide truthful information to Consolidated; and that Consolidated relied to its detriment on Southern's misrepresentations when it withdrew its 1974 suit against Southern and accepted a smaller lump sum payment than would otherwise have been the case. App. 87a-92a.

[3] It was only indisputably intrastate contracts that were the subject of the original lawsuit that Consolidated agreed to forego. However, Consolidated settled that lawsuit based on Southern's representation that *all* contracts between the parties were for intrastate gas, and thus not subject to regulation. Had Consolidated known this was not so, it could have either pursued the litigation or demanded additional consolidation to fully compensate it for the separate damages caused by Southern's breach of the indisputably intrastate contracts.

As the Commission explained in a later order reaffirming its position, the question presented was whether, in effect, "the damages awarded by the New Mexico court . . . represent payments for gas sold by Consolidated to Southern Union under the [disputed] contracts . . . ." FERC determined that they do not. Instead, FERC reasoned, the "award in this case was given . . . because the state court found that Consolidated, by relying on Southern Union's negligent misrepresentation, gave up valuable consideration by not pursuing its court claim and suffered damages as a result." Those damages, FERC concluded, "represent what was suffered by Consolidated as a result of a misrepresentation in the context of a settlement claim under state jurisdiction which is clearly a matter of state concern." The Commission therefore "refuse[d] to second guess the findings" by the state court and noted that although the agency had "had several opportunities to assert its jurisdiction" over the matter, it had "decline[d] to do so each time." App. 62a-63a.

In its appeal to the New Mexico Supreme Court, Southern attacked FERC's resolution of the preemption issue, and expressly contended that the State Supreme Court "is not, of course, bound by the Commission's June 19 Order [resolving the issue]." Rather, Southern asserted, "[t]his Court is clearly free to consider the preemption question presented here and arrive at a decision based on its own legal analysis." Southern Reply Brief at 19 (filed August 5, 1986).

The New Mexico Supreme Court rejected Southern's position on the merits, giving deference to and agreeing with FERC's resolution of the issue. Specifically, the court rejected Southern's contention that this Court's decision in *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981) (*"Arkla"*) precluded the damage award. *Arkla*, the New Mexico Supreme Court held, precluded a state court from effectively awarding a specific interstate

gas price to a party through a breach of contract suit, when that price had not been approved by FERC. The present case, the court reasoned, involved an award of tort damages for misrepresentation during a settlement, not contract prices. Accordingly, the court "conclude[d] . . . that the federal preemption argument advanced by [Southern] has been effectively answered in the appropriate federal forum" [FERC]. The court therefore expressly affirmed the Commission's view and held that the awarded "tort damages do not conflict with federally regulated pricing." App. 78a.

Southern thereafter petitioned this Court for a writ of certiorari, expressly raising the question whether the damage award was preempted by FERC's jurisdiction under this Court's *Arkla* decision. Southern contended that "this Court should grant the Petition because of the significance of the preemption issues raised in this case . . . ." Southern Reply at 8. Consolidated opposed the petition and, on February 22, 1988, this Court denied certiorari. 108 S. Ct. 1021. As a result, on March 25, 1988, the $11 million judgment was paid by Southern to Consolidated (less pre-judgment interest).[4]

C. The Federal Court Proceedings

Meanwhile, having lost its preemption argument in the state courts, Southern attempted to relitigate that precise issue anew in the federal courts. It did so by appealing FERC's adverse determination on the preemption issue to the United States Court of Appeals for the District of Columbia Circuit.

Before the D.C. Circuit, Southern argued that the New Mexico courts' judgment was preempted by FERC's regulatory authority, that FERC had misconstrued that authority, and that the D.C. Circuit had the power to

---

[4] The New Mexico Supreme Court has recently affirmed the trial court's award of $350,000 pre-judgment interest. 762 P.2d 889.

overturn the New Mexico courts' award. Brief for Southern at 14-16, 20. In response, Consolidated contended not only that FERC and the New Mexico courts were correct, but, more importantly, that the D.C. Circuit had no authority to review and overturn the final judgment of the state courts. Consolidated Brief at 22-24.

On September 23, 1988, a panel of the D.C. Circuit reviewed and rejected both FERC's view of its own jurisdiction as well as the New Mexico courts' final judgment affirming that view. The D.C. Circuit furthermore purported to overturn the state courts' award of damages to Consolidated. The panel offered two rationales for taking jurisdiction over the preemption issue: its claim that "the possibility" of later D.C. Circuit review was "manifest" during the state court proceedings and its speculation that this Court "may have declined to issue the writ [to the New Mexico Supreme Court] in deference to the pendency of the proceedings" before the D.C. Circuit.[5]

In its petition for rehearing or for rehearing *en banc*, Consolidated contended that the panel's decision contravened basic principles of comity and federalism in failing

---

[5] The panel stated that "Consolidated opposed [certiorari] in part by an apparent reference to the [D.C. Circuit] proceedings." App. 8a. This is simply wrong, and apparently was based on the panel's confusion between *Southern's* filings and *Consolidated's* filings in this Court.

Consolidated did nothing more than bring to this Court's attention—as it was required to do—that the FERC ruling relied on by the New Mexico Supreme Court was "pending in the United States Court of Appeals for the D.C. Circuit." Opp. Cert. at 8. But Consolidated ceratinly did not imply, much less argue, that this fact should cause this Court to defer or deny the petition.

Southern, on the other hand, specifically urged that "it might be appropriate for the Court to reserve its decision on this Petition until after the Court of Appeals for the D.C. Circuit has reviewed the FERC Order." Southern Reply at 9. Nevertheless, this Court elected neither to review the New Mexico decision nor to defer action awaiting D.C. Circuit review. Instead, the Court simply denied certiorari, rendering the New Mexico decision final.

to give preclusive effect to the New Mexico Supreme Court's judgment, that the decision seriously erred in failing to give any deference whatever to FERC's construction of the preemption issue, and that in any event it had misjudged that issue under this Court's *Arkla* decision. FERC joined in the request for rehearing, arguing that the agency's decision had "establish[ed] a fair balance between competing state and federal interests," and that the panel's upsetting of that balance "will not serve to protect natural gas customers, but will shield Southern Union from the consequences of its tortious actions." FERC Response to Petition for Rehearing at 6-7.

Southern opposed rehearing on the ground that the New Mexico courts had *no jurisdiction* to decide the preemption issue, and that the D.C. Circuit was therefore not bound by those courts' resolution of the issue. Southern Response to Petition for Rehearing at 1-7. Southern took this view even though, as noted, it had expressly urged the New Mexico Supreme Court to decide the preemption issue and thereafter sought—and was denied—review of that issue in this Court.

On September 12, 1989, the panel denied rehearing without opinion, and the full court denied *en banc* review with three judges dissenting—Chief Judge Wald, Judge Buckley, and Judge Williams. In their dissenting opinion (per Judge Williams), those three judges noted that state courts are presumed to have "concurrent jurisdiction over issues of federal law," and that, unless some exception to that jurisdiction were established, the state courts' prior resolution of the federal preemption issue "would preclude a second resolution of that issue . . . by . . . this court." App. 98a.

D. Attempts to Resolve the Conflict between the State and Federal Courts

Having thus prevailed in the D.C. Circuit, on October 12, 1988 Southern returned to the New Mexico Supreme Court and moved "for rehearing and relief from judg-

ment." Specifically, Southern argued that because "the [New Mexico] Court's opinion on the preemption question has now been reversed" by the D.C. Circuit, the New Mexico court should vacate its own opinion on that issue and recall the damage award already paid to Consolidated. Southern Brief in Support of Motion at 6. The New Mexico Supreme Court denied this motion on November 2, 1988.

Then, on November 15, 1988, Southern moved the New Mexico Supreme Court to stay or recall its mandate, contending that "[t]he decision of the D.C. Circuit Court of Appeals and the decisions of this Court have subjected the parties to conflicting obligations." Southern Motion at 3. Specifically, Southern noted, the state courts' decisions "permit Consolidated to collect the damages and interest awarded in this case," while the decision of the D.C. Circuit, "on the other hand, precludes Consolidated from collecting such damages and interest." *Id.*

Southern furthermore stated that it intended to seek review in this Court of the New Mexico Supreme Court's judgment denying rehearing. Accordingly, Southern contended, if the New Mexico Court did not stay its mandate while Southern sought certiorari, the parties would be forced to violate either the state or federal court's order. *See id.* at 3-4. On November 16, 1988, the New Mexico Supreme Court denied the motion for stay, thereby rendering irreconcilable the two courts' conflicting orders.

Rather than seek certiorari as it had represented it would do, instead, on September 28, 1989, after the D.C. Circuit denied rehearing *en banc*, Southern moved FERC "for expedited execution of the U.S. Court of Appeals' remand order requiring a refund of gas payments." In response, on October 13, 1989 Consolidated urged FERC to stay any such execution—which would directly violate the New Mexico courts' final orders—pending resolution of the present petition for writ of certiorari. The motion for expedited refund is currently pending.

REASONS FOR GRANTING THE WRIT

There are five reasons why certiorari is appropriate in this case. Taken together, the reasons demonstrate a compelling necessity for this Court's review.

1. First, and probably most important, this case presents a head-on collision between the federal and state courts that only this Court can correct. The two lower courts have taken directly contradictory views on the underlying federal issue, have expressly refused to yield to each other, and have insisted that their respective judgments be enforced; the result is that each court has commanded the parties to do what the other court has prohibited. Only this Court—sitting atop the two warring judicial hierarchies—can resolve this intolerable dilemma.[6]

---

[6] Similar conflicts between the state and federal courts have arisen before, and may well recur absent this Court's review here. For example, last Term, in comparable circumstances, the Mississippi Supreme Court determined that FERC's jurisdiction did not preclude a state breach of contract action for sale of certain natural gas. *Southern Natural Gas Co.* v. *Fritz*, 523 So.2d 12 (Miss. 1987). FERC thereafter determined that the action *was* precluded, and this contrary determination was appealed to the Court of Appeals for the Fifth Circuit. Meanwhile, the Mississippi court's decision was petitioned to this Court, *Southern Natural Gas Co.* v. *Fritz*, No. 88-148, and the Court invited the views of the Solicitor General. 109 S. Ct. 216 (1988).

In response, the Solicitor General and FERC contended that the underlying issue was unworthy of the Court's review, and that there would be no conflict on the issue unless the Fifth Circuit affirmed FERC; they furthermore contended that even if FERC were affirmed, the Mississippi Supreme Court might thereafter vacate its decision and thereby avoid the conflict. Brief for the United States and FERC at 15, 17-18. The Fifth Circuit subsequently vacated FERC's orders on unrelated grounds, *Fritz* v. *FERC*, 876 F.2d 1224 (1989). Concluding that this action "eliminated the principal concern that may have rendered further review appropriate," the Solicitor General thereafter urged the Court to deny the petition, Supplemental Memorandum for the United States and

2. Second, the dilemma in this case was a needless one; it has been produced by the D.C. Circuit's direct violation of several fundamental principles repeatedly articulated by this Court. Thus, this Court has emphatically declared that state courts have jurisdiction and competency to adjudicate questions of federal law. *See, e.g., D.C. Court of Appeals* v. *Feldman*, 460 U.S. 462, 484 n.16 (1983); *Allen* v. *McCurry*, 449 U.S. 90, 105 (1980). This jurisdiction includes the authority to decide federal preemption questions such as the one presented to the New Mexico courts in this case. *Pan American Petroleum Corp.* v. *Superior Court of Delaware*, 366 U.S. 656, 664-65 (1961).[7]

This Court has furthermore settled that once a party has presented a federal question for resolution in the state courts, it is not entitled to relitigate that question in the federal courts. As this Court summarized the rule in *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 419 (1964): "we see no reason why a party, after unreservedly litigating his federal claims in the state courts . . . should be allowed to ignore the adverse state decision and start all over again in the [federal courts]." This is so not only because common-law principles of res judicata are applicable in federal courts, *Allen* v. *McCurry*, 449 U.S. at 94-96, but also because 28 U.S.C. § 1738 *commands* the federal courts to give full

---

FERC at 4, which the Court did shortly thereafter. 110 S. Ct. 232 (1989).

The crucial difference between this case and *Fritz*—and that makes certiorari appropriate here—is that here the conflict between the federal and state courts is fixed and final; indeed, both lower courts have been fully apprised of the other's contradictory orders and both have refused to vacate their own orders. Accordingly, only this Court's review can now resolve the conflict.

[7] Indeed, *Arkla* itself was decided in the Louisiana state courts and no question whatever was raised concerning their jurisdiction to do so.

faith and credit to the final judgments of state courts. *Marrese* v. *American Academy of Orthopedic Surgeons*, 470 U.S. 373, 380 (1985); *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461, 466-68 (1982).

Indeed, where as here, a state supreme court has finally decided a question of federal law, the lower federal courts "possess no power whatever" to sit in review of that decision. *Atlantic Coast Line R.R. Co.* v. *Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 296 (1970). *Accord, D.C. Court of Appeals* v. *Feldman*, 460 U.S. at 483-84 n.16; *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 416 (1923). Accordingly, only this Court had jurisdiction to review and overturn the New Mexico court's judgment and, once this Court denied certiorari, that judgment became final. *Feldman*, 460 U.S. at 476; *Atlantic Coast Line*, 398 U.S. at 296; *Rooker*, 263 U.S. at 416.[8] Because the D.C. Circuit has violated each of these basic principles, certiorari should be granted.

3. The D.C. Circuit's decision has not only contradicted all the cited decisions of this Court, it has also seriously undermined the several important policies that underlie those decisions. One of those policies, of course, is to avoid precisely what has occurred here—"inconsistent results" flowing from "duplicatory litigation." *Hoag* v. *New Jersey*, 356 U.S. 464, 470 (1958). *Accord, Montana* v. *United States*, 440 U.S. 147, 153-54 (1979). But there are policies of even broader implication threatened by the decision in this case.

---

[8] However the D.C. Circuit may have characterized its action, that court unquestionably reviewed and purported to reverse the New Mexico court's judgment. For "[w]here federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment." *Pennzoil Co.* v. *Texaco, Inc.*, 481 U.S. 1, 25 (1987) (Marshall, J., concurring in the judgment). *Accord, Feldman*, 460 U.S. at 484 n.16.

This Court's interpretation of 28 U.S.C. § 1738 and the res judicata principles it codified has served to protect parties "from the expense and vexation attending multiple lawsuits," has "conserve[d] judicial resources," and has "foster[ed] reliance on adjudication." *Allen* v. *McCurry*, 449 U.S. at 95-96; *Montana* v. *United States*, 440 U.S. at 153-54. It has furthermore served to "promote the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen* v. *McCurry*, 449 U.S. at 96. *Accord*, *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. at 478. Moreover, strict enforcement of 28 U.S.C. § 1738 has necessarily improved "the quality of adjudication" in the state courts by increasing "the incentive for full participation by the parties and for searching review by state officials." *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. at 478.[9]

In short, the policies underlying the full faith and credit requirement are "central to the purpose for which civil courts have been established, the *conclusive resolution* of disputes within their jurisdictions." *Montana* v. *United States*, 440 U.S. at 153 (emphasis supplied). All of these important policies are eroded by the D.C. Circuit's decision in this case. For if that court and other lower federal courts are free to redetermine state court resolutions of federal questions, those state courts and the parties before them will have little incentive to seek a full and fair litigation of such questions.

Moreover, if the D.C. Circuit's decision in this case is permitted to stand, it will subvert the willingness of state courts to seek guidance from federal agencies and for those agencies to offer such guidance. In our view, the New Mexico courts' approach to the federal question at issue is a model for how a federal agency's opinion

---

[9] The requirement that federal questions first be presented to the state courts before being raised before this Court has further promoted full and fair litigation of such questions in the state courts. *See Feldman*, 460 U.S. at 484 n.16.

should be sought and considered for purposes of resolving such a question. But if the D.C. Circuit—which reviews more agency determinations than any other court—is free to disregard a state court's review and approval of an agency interpretation, neither the parties, nor the agencies, nor the state courts will be inclined to participate in state-court consideration of agency-related federal questions. For they all will be aware that the D.C. Circuit intends to start over again in any event.

Petitioner submits that such a result is contrary to this Court's precedents and destructive of the critical policies underlying those precedents. For that reason alone it merits this Court's review.[10]

4. Furthermore, even assuming the D.C. Circuit were permitted to relitigate the preemptive nature of FERC's jurisdiction in this case—which we deny—that court clearly contradicted this Court's established principles re-

---

[10] Even if there could ever be a case where a lower federal court could redetermine a question already determined by a state court, it could not be on the grounds suggested by the D.C. Circuit's decision. This Court has firmly established that full faith and credit must be given to a state court decision unless *the State's* own preclusion standards would permit relitigation. *Marrese*, 470 U.S. at 380; *Kremer*, 456 U.S. at 481-82. In this case, it is undisputed that New Mexico would not have permitted relitigation of the federal preemption question in its own courts. *See, e.g., Matsu* v. *Chavez*, 96 N.M. 775, 635 P.2d 584, 587 (1981); *Adams* v. *United Steelworkers of America*, 97 N.M. 369, 373, 640 P.2d 475, 479 (1982). This fact alone should have precluded the D.C. Circuit's action.

Furthermore, the standards the D.C. Circuit used to justify relitigation are in any event completely unsound. As noted, the D.C. Circuit redetermined the preemption issue based on two factors: because it was "manifest" that D.C. Circuit review might occur, and because certiorari was opposed in this Court due to the pendency of the D.C. Circuit proceedings. The former factor, of course, would justify relitigation *any* time parallel proceedings occurred in two different courts and would make nonsense of preclusion principles that apply to those courts. The latter factor, as previously shown (p. 8 n.5), the panel was simply mistaken about.

garding the deference that was due FERC's view of the issue.

It has long been settled that the courts must enforce an agency's interpretation of its own enabling statute if that interpretation is reasonable and not directly contrary to the plain meaning of the statute. *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984).[11] Here, the D.C. Circuit did not apply this Court's deference standards *at all*; instead, it simply interpreted the governing statutes (the NGA and NGPA) *de novo* and, disagreeing with both FERC and the New Mexico Supreme Court, purported to enforce its own view of the statutes. Under this Court's decisions, even if the D.C. Circuit could wholly disregard the state court's decision—which, again, we deny—it could not similarly disregard the agency's decision.

5. Finally, even putting to one side the serious jurisprudential questions posed by the D.C. Circuit's overturning of both FERC's and the state courts' decisions, there remains one further reason why this Court should grant review—the significant nature of the underlying federal question. As Southern itself demonstrated in its petition for certiorari from the New Mexico Supreme Court's final judgment, uniform administration of FERC's authority under the NGA and NGPA is a matter of considerable national importance. Petition at 7. As it further demonstrated, the underlying question presented here—the permissibility of tort suits between producers and interstate gas purchasers—arises frequently in the lower courts. Southern Reply at 8 & n.6. And as Southern noted (Petition at 7-8, 21-22), that question is one

---

[11] *Accord, Mississippi Power & Light Co.* v. *Mississippi*, 108 S. Ct. 2428, 2442-44 (1988) (Scalia, J., concurring in the judgment); *Commodity Futures Trading Comm'n* v. *Shor*, 478 U.S. 833, 844-45 (1986); *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221, 226, 233 (1986).

this Court expressly reserved in its *Arkla* decision. 453 U.S. at 583 n.13.

Consolidated opposed certiorari in the state court proceedings on the ground that there was then no conflict in the lower courts and thus no threat to the uniform enforcement of the federal statutes. But now, by virtue of the conflict between the D.C. Circuit and New Mexico Supreme Court on the issue, uniform enforcement is in jeopardy. Moreover, because the conflict has occurred in a single case and has produced directly contradictory judgments against the affected parties, the parties cannot fully comply with both judgments. Accordingly, for this and all the other reasons cited, certiorari is now appropriate.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari and reverse the judgment below.

Respectfully submitted,

ALLEN R. SNYDER
WALTER A. SMITH, JR.*
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5728

RICHARD G. MORGAN
JAMES L. MARKETOS
LANE & MITTENDORF
919 18th Street, N.W.
Washington, D.C. 20006
(202) 785-4949

* Counsel of Record

Counsel for Petitioners

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 87-1232

SOUTHERN UNION COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

CONSOLIDATED OIL AND GAS, INC.,
Intervenor.

Petition for Review of Order of the Federal Energy Regulatory Commission

---

Argued May 31, 1988

Decided Sept. 23, 1988

Robert H. Loeffler with whom W. Stephen Smith and Margaret A. Flaherty, Washington, D.C., were on the brief, for petitioner. William F. Squadron, Washington, D.C., also entered an appearance, for petitioner.

Samual Soopper, Atty., F.E.R.C., with whom Catherine C. Cook, Gen. Counsel and Jerome M. Feit, Sol., F.E.R.C., Washington, D.C., were on the brief, for respondent.

Joe Davies, Atty., F.E.R.C., Washington, D.C., also entered an appearance, for respondent.

Richard G. Morgan, Washington, D.C., was on the brief, for intervenor Consol. Oil and Gas, Inc.

Before ROBINSON, RUTH BADER GINSBURG, and SENTELLE, Circuit Judges.

Opinion for the Court filed by Circuit Judge SENTELLE.

SENTELLE, Circuit Judge:

Southern Union Company ("Southern Union") has petitioned for review of orders of respondent Federal Energy Regulatory Commission ("FERC" or "Commission") which denied Southern Union's petition for a declaratory order that federal regulation of interstate gas prices prevents collection by intervenor Consolidated Oil & Gas, Inc. ("Consolidated") of a certain state court judgment obtained against Southern Union. The judgment awarded benefit-of-the-bargain damages for Southern Union's negligent misrepresentation, in connection with a litigation settlement agreement, that gas purchased by Southern Union from Consolidated under certain existing contracts was not subject to federal price regulation. We conclude that the Commission erroneously determined that the matter was not controlled by *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981) ("*Arkla*"), and vacate its orders.

FACTUAL BACKGROUND

Petitioner Southern Union purchases natural gas in New Mexico for resale in both interstate and intrastate commerce.[1] Intervenor Consolidated produces and sells

---

[1] It is immaterial to the issues before us that the purchaser was Southern Union Gathering Company, Southern Union's wholly-owned subsidiary. We therefore refer herein solely to Southern Union for convenience.

natural gas in New Mexico to Southern Union. The two entered into various contracts, including four indirectly at issue here involving interstate gas and six others that involved only intrastate gas. Consolidated sold the interstate gas to Southern Union first under authority of a certificate of public convenience and necessity and later a small-producer certificate, both of which limited its price to a federally-regulated level.

In 1974, Consolidated sued Southern Union in New Mexico state court for breach of the "favored nation" provision in the six intrastate contracts, which assured Consolidated that it would receive as much for its gas as Southern Union paid any other producer. The litigation settled in 1976 and Consolidated dismissed its claims. The settlement agreement, at the insistence of Consolidated, covered all ten previously mentioned contracts between the parties and contained a recitation that all gas covered by the settlement agreement was solely intrastate. Shortly thereafter, claiming mistake, Southern Union refused to pay any amount higher than the interstate rate on the four contracts on the grounds that the gas sold under the four contracts was in fact interstate and that any higher payment was therefore illegal.

In 1979, Consolidated sued Southern Union on the settlement agreement in New Mexico state court, seeking specific performance and damages equal to the unpaid difference between the rate specified in the settlement agreement and the lower interstate rate actually paid by Southern Union. Southern Union and the state trial court separately sought rulings from respondent Commission on the jurisdictional status of the gas under the four contracts, and FERC ruled that it was interstate gas for which Consolidated could not collect contract damages in excess of federal rates without authority from FERC. *Southern Union Gathering Co.*, 28 F.E.R.C. ¶ 61,225, at 61,427 (1984), *reh'g denied*, 30 F.E.R.C. ¶ 61,350, at 61,708 (1985), *aff'd sub nom. Consolidated*

Oil & Gas, Inc. v. FERC, 806 F.2d 275 (D.C.Cir.1986). The Commission noted, but did not resolve, the question whether damages for fraud that would have the effect of Consolidated realizing an unauthorized rate would be subject to its approval. 28 F.E.R.C. ¶ 61,225, at 61,427. In denying Consolidated's request for rehearing, the Commission clarified that its ruling was not an automatic test; instead, the Commission would consider any actual award in light of a number of factors. 30 F.E.R.C. ¶ 61,350, at 61,711.[2]

In addition to breach of contract, Consolidated's complaint alleged both fraud and negligent misrepresentation, and Consolidated won a judgment on the latter theory. The New Mexico trial court found that Southern Union had negligently misrepresented that the gas purchased under the four contracts was resold intrastate, inducing Consolidated to release its claims in the 1974 litigation over the six intrastate contracts. Consolidated failed, however, to prove its claim for fraud and punitive damages. *Consolidated Oil & Gas, Inc. v. Southern Union Co.*, No. SF 79-2161(C), 2 (N.M.Dist.Ct. May 21, 1985), Joint Appendix ("JA") 14 (letter order announcing decision). The court awarded as damages the difference between the interstate rate actually paid and the higher rate that "would have been paid had the representations of SOUTHERN UNION been true." *Consolidated Oil & Gas, Inc. v. Southern Union Co.*, No. SF 79-2161(C) (N.M.Dist.Ct. Jul. 12, 1985) (decision; emphasis in original). The New Mexico Supreme Court affirmed, holding as to damages that its "affirmance is based not solely on what prices would have been permissible according to contract, but rather on the values Consolidated thought it would receive when it relied on the representations made by [Southern Union]," taking into account "the

---

[2] The factors enumerated by the Commission included the amount and basis of damages, relevant facts and circumstances of each case, and applicable legal principles.

nature of the suit."[3] *Consolidated Oil & Gas, Inc. v. Southern Union Co.*, 106 N.M. 719, 725, 749 P.2d 1098, 1104 (1987), *cert. denied*, —— U.S. ——, 108 S.Ct. 1021, 98 L.Ed.2d 986 (1988).

THE PROCEEDINGS BELOW

Concurrently with its now-failed state appeal, Southern Union petitioned FERC a second time, seeking a declaratory order that Consolidated could not collect its judgment because to do so would constitute exacting an unlawful price for interstate gas. The Commission has entered three orders, all adverse to Southern Union, essentially on the grounds that the judgment is in fact an award of damages for tort and not for the purchase price of gas. *Southern Union Co.*, 35 F.E.R.C. ¶ 61,359, at 61,822 (1986), *reh'g denied*, 39 F.E.R.C. ¶ 61,212, at 61,745, *reaff'd*, 41 F.E.R.C. ¶ 61,203, at 61,529 (1987). The last reconsideration occurred, with our leave, after Southern Union had filed its petition here. It is this order which we now review. The Commission initially relied, 35 F.E.R.C. ¶ 61,359, at 61,822, upon its decision in *Gulftide Gas Corp.*, 31 F.E.R.C. ¶ 61,288, at 61,594 (1985), in which the Commission ruled that certain punitive damages awarded by a state court for fraudulent misrepresentation were not awarded to compensate for gas but to punish and that the actual damages there awarded were within the lawful maximum price. *Id.* at 61,596. FERC abandoned its reliance on *Gulftide Gas* in its final order below in favor of a simple declaration that the state court decision represented damages, sounding in tort, as compensation for rights surrendered by Consolidated in reliance on Southern Union's negligent misrepresentation regarding the jurisdictional status of the gas. 41 F.E.R.C. ¶ 61,203, at 61,531. The Commission concluded that the damages were not compensation for

[3] *See infra* note 5.

gas and that no federal interests were infringed. The Commission consistently distinguished *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981) ("*Arkla*"), as a contract case involving the filed rate doctrine.

Southern Union's petition also sought an order that Consolidated refund a portion of a lump sum paid to Consolidated at the time of the 1976 settlement. Southern Union claimed that the refund sought also represented payments in excess of interstate rates for the disputed contracts, but the Commission determined that Southern Union had not so demonstrated and denied that portion of the petition. That issue is not before us on Southern Union's petition for review of FERC's orders and we express no opinion thereon.[4]

ANALYSIS

A. *Reviewability*

No party questions our jurisdiction of this petition for review, 15 U.S.C. §§ 717r(b), 3416(a)(4) (1982), but intervenor Consolidated questions FERC's jurisdiction below in two respects. First, Consolidated contends that FERC has no statutory power to review or alter a judgment for tort damages awarded in state-court litigation that does not involve the sale of natural gas. The present case, in Consolidated's view, involved only a litigation settlement agreement. This contention is without merit. Consolidated cites no authority in support of its proposition and concedes the authority of the Commission to determine and enforce first-sale price ceilings for natural gas. Brief for Intervenor at 22. That conceded authority is exclusively federal. 15 U.S.C. §§ 717u, 3414 (1982); *Arkla*, 453 U.S. at 580-82, 101 S.Ct. at 2931-33, and in-

[4] The issue presented in Southern Union's brief addresses only "damages for a purchaser's 'negligent misrepresentation.'" Brief for Petitioner at 1. The refund sought was paid under the settlement agreement. 41 F.E.R.C. ¶ 61,203, at 61,532 (1987).

cludes the incidental power to determine whether in fact a state court action, however denominated, has the impermissible effect of infringing the exclusively federal prerogative. *See Arkla*, 453 U.S. at 578-79, 101 S.Ct. at 2930-31.

Consolidated raises a second contention. In Consolidated's view, the federal preemption and measure-of-damages issues are barred on the grounds of issue preclusion or collateral estoppel because the state courts decided the issues adversely to Southern Union after full and fair hearing and because both issues were raised in Southern Union's petition to the Supreme Court for a writ of *certiorari*. The short answer to Consolidated's contention is that the possibility of the instant proceedings have been manifest almost from the beginning of the state court action. The state trial court referred questions of jurisdiction and price to FERC, " 'absent controlling principles of state law with respect to actions at law for fraudulent and deceitful conduct.' " 28 F.E.R.C. ¶ 61,225, at 61,425 (1984) (quoting referral). The court failed to find fraud, but FERC's response reserved the right to exercise jurisdiction in the event that state-awarded tort damages effectively increased Consolidated's rate over the lower of either the applicable ceiling price or contract price. 28 F.E.R.C. ¶ 61,225, at 61,427. Consolidated's petition for review of that order made no issue of this reservation of right, and we fully affirmed the then-contested portions of FERC's determination. 806 F.2d at 281.

We are not persuaded that application of the issue preclusion doctrine would be fair in this case. *See generally Otherson v. Department of Justice*, 711 F.2d 267, 273 (D.C.Cir.1983) (fairness a factor in issue preclusion); *cf.* Restatement (Second) of Judgments § 28(1), (3) & Comments a, e (1982) (exceptions to collateral estoppel based on lack of opportunity for review of initial decision, and based on state/federal jurisdictional

allocations). Southern Union petitioned the United States Supreme Court for a writ of *certiorari*, which Consolidated opposed in part by an apparent reference to the instant proceedings. In light of the distinct possibility that the Court may have declined to issue the writ in deference to the pendency of the proceedings below, we decline to apply the doctrine of collateral estoppel with its full rigor to Southern Union.

B. *The Arkla Decision*

Having affirmed the Commission's right to have considered the matter below, we proceed to examine its decision under the standard of review specified in 5 U.S.C. § 706 (1982). Southern Union's principal contention is that the Commission's decision was not in accordance with law because FERC was bound by, but did not follow, the decision in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981) ("*Arkla*"). We agree.

In *Arkla*, where a favored nation clause was triggered, the seller sued on the contract and won in state court, and the buyer appeared to owe a higher price for interstate gas but for the filed rate doctrine. "Under that doctrine, no regulated seller is legally entitled to collect a rate in excess of the one filed with the Commission for a particular period." 453 U.S. at 576, 101 S.Ct. at 2929. The seller there had the contract rate on file with FERC's predecessor, the Federal Power Commission, and had not filed the higher favored nation rates because the buyer failed to notify the seller it was paying a higher rate to others. The Louisiana Supreme Court determined that it was the buyer's failure to inform the seller of the provision-triggering payments that had prevented the seller from filing necessary rate increase requests, and that such requests probably would have been approved because the new rates still would have been within applicable ceilings. *Hall v. Arkansas Louisiana Gas Co.*, 368 So.2d 984, 991

(La.1979). Since Louisiana law regarding failed contractual conditions provided that "'one should not be able to take advantage of his own wrongful act,'" *id.* at 990, the filings were deemed to have been made and the favored nation provision was enforced by the state courts. *Id.*

The United States Supreme Court vacated the Louisiana Supreme Court's calculation of damages. 453 U.S. at 584-85, 101 S.Ct. at 2933-34. The Court indicated that neither state nor federal courts can exercise the Commission's power to determine what are just and reasonable rates, and FERC itself cannot make retroactive rate adjustments. The Court agreed with the buyer's argument that "[n]o matter how the ruling of the Louisiana Supreme Court may be characterized, . . . it amounts to nothing less than the award of a retroactive rate increase . . . ." *Id.* at 578, 101 S.Ct. at 2931. The Court was not persuaded that the buyer's concealment that prevented the seller from making necessary filings justified an estoppel exception to the doctrine. *Id.* at 583 & n. 13, 101 S.Ct. at 2933 n.13. The court below had found a simple breach of contract, and the record contained no finding of misconduct or intentional failure to inform. The Court reserved the question of the effect on the doctrine of "affirmative misconduct" or "fraudulent conduct" for another day. *Id.* at n. 13.

C. *Applicability of Arkla*

We think the Commission observed correctly, in the earlier phase of this matter, that the distinction between amounts in excess of a filed rate at issue in *Arkla* and amounts in excess of the applicable price ceiling at issue here is not a material difference with respect to damages awarded for breach of contract. 28 F.E.R.C. ¶ 61,225, at 61,427 (1984). The Commission determined, however, that it was not bound by *Arkla* because that case addressed itself to contract damages under the filed rate

doctrine, whereas the damages here were awarded for the tort of negligent misrepresentation in the course of settlement negotiations. *See* 41 F.E.R.C. ¶ 61,203, at 61,532 (1987).

This is an inadequate basis upon which to distinguish *Arkla*. First, the tort-contract distinction is not determinative in this context. Federal gas-price regulation is exclusive. 453 U.S. at 577, 580, 101 S.Ct. at 2930, 2931. Although the applicable statute governs the "sale" of natural gas, 15 U.S.C. §§ 717c, 3314(a) (1982), the preemptive effect of the statute is not thereby limited to state actions that directly and expressly relate to the price term of sale transactions. The test is instead whether state law conflicts or interferes with attainment of federal law objectives. *Cf. Chicago & North W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 319, 101 S.Ct. 1124, 1131, 67 L.Ed.2d 258 (1981) (must be "inconsistent"). In *Arkla* itself, the Court cited the "state common-law tort action" preempted in *Kalo* as "analogous," 453 U.S. at 580, 101 S.Ct. at 2932, to the preempted breach of contract claim before it. Second, the Court in *Arkla* recognized that it is significant which remedies are provided and which are not in a scheme of federal regulation, and the Court implicitly indicated that the unavailability of retroactive rate increases from FERC thereby negated their availability in a state forum. 453 U.S. at 584, 101 S.Ct. at 2934. In a related vein, the Court concerned itself with the *effect* of the state judgment, determining not to permit "what amounts to" a retroactive rate increase in the form of a judgment for breach of contract. *Id.* Thus we conclude that neither we nor FERC can determine whether the state judgment awarding damages for negligent misrepresentation conflicts with federal law simply by considering the basis of liability alone. Instead, we must also examine the practical effect of the state remedy as well.

It is here that we conclude that the Commission erred. To remedy the effect of Southern Union's negligent representation, the state awarded damages that unquestionably were for the price of gas. The trial court was explicit that the damages represented "the difference between the interstate prices paid for their gas by Southern Union and the intrastate prices which *should have been paid* by Southern Union, that is to say, *the benefit of the bargain.*" *Consolidated Oil & Gas, Inc. v. Southern Union Co.*, No. SF 79-2161(C) (N.M.Dist.Ct. May 21, 1985), JA 14 (letter order announcing decision; emphasis supplied). The trial court also made a finding that Consolidated's damages were "the difference between what it was paid by SOUTHERN UNION under the settlement agreement and the amount it *would have been paid had the representations of SOUTHERN UNION been true.*" *Consolidated Oil & Gas, Inc. v. Southern Union Co.*, No. SF-79-2161 (C) (N.M.Dist.Ct. Jul. 12, 1985), JA 24 (decision; capitalization original, other emphasis supplied). In affirming, the New Mexico Supreme Court stated that the damages represented "the values Consolidated thought it would receive when it relied on the representations made by" Southern Union.[5] *Consolidated Oil & Gas, Inc. v. Southern Union Co.*, 106 N.M. 719, 725, 749 P.2d 1098, 1104 (1987). The record is quite clear, however, that the subject matter of these expectations and representations was the price agreed to be paid for gas in the settlement agreement. Consolidated asserted in its answer to Southern Union's petition below to FERC that "[t]he contract involved in the New Mexico litigation is the 1976 Settlement Agreement," JA 443, and "[t]he Settlement Agreement established prices for specific vintages of gas sold by Consolidated to Southern Union under all contracts." JA 425. The gas sold under four of those contracts has been determined to be subject

---

[5] The quoted passage occurs in a discussion of state pricing limitations, but is equally applicable to federal pricing limitations.

to the interstate price limitation. 806 F.2d at 277. It follows quite plainly then, that the state measure of damages is based upon, and has the effect of awarding, a price for interstate gas that, to the extent that price exceeds federal guidelines, the state court has no power to award. To that extent, the settlement agreement simply is a bargain that the state has no power to enforce. The judgment here is indistinguishable from the one that was disapproved in *Arkla*, except for the stated basis of liability for damages.

This leads us, of course, to whether the present judgment falls within the postulated misconduct exception to *Arkla*. The state has found that Southern Union's conduct was negligent but not fraudulent. *Consolidated Oil & Gas, Inc. v. Southern Union Co.*, No. SF 79-2161(C), 2 (N.M. Dist.Ct. May 21, 1985), JA 14 (letter order announcing decision). We conclude that negligent misrepresentation alone is not a sufficiently culpable level of misconduct to avoid the effect of *Arkla*. The *Arkla* Court indicated that it would require fairly egregious conduct to consider making an equitable exception to its ruling by the phrases it used to describe what the seller there had *not* shown: "intentionally failed," "effort to defraud," "affirmative misconduct," "fraudulent conduct." *Arkla*, 453 U.S. at 583 & n. 13, 101 S.Ct. at 2933, n. 13. The less specific term *misconduct* is used in a context that clearly indicates that it is fraudulent misconduct that is thereby intended; nothing in the passage indicates that a lesser standard of misconduct, such as negligence, was intended by the Court. Our reading is consistent with the Court's immediately following observation that a showing of a violation of state law, without more, is insufficient to change its analysis. *Id.* at 584, 101 S.Ct. at 2934. We also note that the *Arkla* Court reached its result without addressing the fact that the Louisiana Supreme Court implicitly characterized the buyer's misconduct as a "wrongful act." *Hall*, 368 So.2d at 990. Mere negligence

—all that was found here—is conduct in violation of state-prescribed standards of conduct and therefore arguably misconduct, but is not, in our view, such "affirmative misconduct," 453 U.S. at 583, 101 S.Ct. at 2933, over and above violation of state law as to "affect the analysis." *Id.* at 584, 101 S.Ct. at 2934. Our conclusion that the Commission's order failed to follow a controlling case, then, remains unaltered.

There is no occasion for us to question FERC's acceptance of the state court determination of the basis of liability, and we have disregarded the portion of Southern Union's brief questioning the findings and conclusions. Nor do we question New Mexico's use of the benefit-of-the-bargain measure of damages for negligent misrepresentation when federal gas price limitations are not exceeded. As did the Court in *Arkla*, we determine no more than that the "calculation of damages," *id.* at 585, 101 S.Ct. at 2934, employed by the New Mexico courts was inconsistent with preemptive federal gas-price regulation and that the Commission failed to follow the controlling *Arkla* case. Accordingly, we set aside the Commission's orders that are the subject of this petition and remand the matter to FERC for such further proceedings as are necessary and consistent herewith. The petition is hereby

GRANTED.

APPENDIX B

FEDERAL ENERGY REGULATORY COMMISSION

[¶ 61,225]

Docket No. CI30-264-000

SOUTHERN UNION GATHERING COMPANY

Order Responding to Judicial Referral and Petition for Declaratory Order

---

(Issued August 20, 1984)

Before Commissioners: Raymond J. O'Connor, Chairman; A. G. Sousa, Oliver G. Richard III and Charles G. Stalon.

Southern Union Gathering Company (Gathering Company) filed on March 25, 1980, a petition for a declaratory order in this matter. In response, Consolidated Oil and Gas, Inc. (Consolidated),[1] a small producer, filed on May 2, 1980, a protest and on June 20, 1980, a motion to dismiss. Consolidated also filed a timely motion to intervene on June 6, 1980.

The factual background. According to the petition and the other pleadings herein, a dispute arose between Con-

---

[1] "Consolidated," as used herein, shall also have reference to predecessors in interest to Consolidated under its gas sales contracts involved in this proceeding.

solidated and Gathering Company in 1974 concerning sales of Consolidated's gas in the San Juan Basin, New Mexico, to Gathering Company. The dispute concerned whether certain favored nations pricing provisions in several gas sales contracts between Consolidated and Gathering Company had been activated by gas purchase prices paid by Gathering Company to other producers, so as to entitle Consolidated to higher prices.

In September 1974, Consolidated filed suit against Gathering Company in the State District Court in Santa Fe, New Mexico, alleging breach of those pricing provisions. In 1976, a settlement agreement was entered into between Consolidated and Gathering Company which provided for higher prices under ten Consolidated-Gathering Company contracts, including a lump-sum payment relative to past sales.

Gathering Company alleges that the settlement agreement assumed that all the gas under the ten contracts was sold in intrastate commerce and was therefore not subject to the jurisdiction of the Federal Power Commission, predecessor to the Federal Energy Regulatory Commission. However, Gathering Company later claimed that four of the contracts (hereinafter sometimes referred to as the Consolidated contracts) are subject to this Commission's jurisdiction under the Natural Gas Act and that there was a mutual mistake of the parties in assuming that all of the contracts covered by the settlement involved intrastate gas only. Gathering Company has refused to honor the settlement prices as to those four contracts, insofar as they are higher than the applicable ceiling prices under the Natural Gas Act and the Natural Gas Policy Act of 1978, on the ground that to do so would have been contrary to law.[2]

The Consolidated contracts are dated August 24, 1956, January 1, 1958, September 6, 1960, and November 26,

[2] The settlement was never submitted to or approved by this Commission.

1960, and are covered by certificates of public convenience and necessity issued by the FPC in 1959 and 1963.[3] On April 17, 1972, the FPC issued Consolidated a blanket small producer certificate, and subsequently all sales under the Consolidated contracts were made under this certificate. An order issued October 18, 1972, terminated the original certificate covering those sales and cancelled their rate schedules.[4]

Gathering Company owns and operates gas gathering facilities in the San Juan Basin of New Mexico through which gas, including gas under the Consolidated contracts, is purchased from Consolidated and other producers and gatherers. The resultant commingled gas stream is sold by Gathering Company in part to Gas Company of New Mexico, a division of Southern Union Company, and in remaining part to El Paso Natural Gas Company (El Paso). The gas sold to Gas Company is consumed within the State of New Mexico, while the portion sold to El Paso is transported and resold in interstate commerce by El Paso.[5]

Consolidated again filed suit in 1979 against Gathering Company in the State District Court in Santa Fe, New Mexico, alleging a breach of the 1976 settlement agreement because of the failure of Gathering Company to pay

---

[3] The Consolidated contracts were all executed prior to April 3, 1961, the date on and after which price escalation clauses in jurisdictional gas sales contracts were prospectively made inoperative, subject to certain stated exceptions not relevant here. Contracts with such clauses executed on or after April 2, 1962, are subject to rejection if filed as rate schedules. *See* 18 C.F.R. § 154.93.

[4] The small producer blanket certificate procedure was established by Commission Order No. 428, 45 FPC 454, issued March 18, 1971. It is codified at 18 C.F.R. § 157.40.

[5] The gas purchased by Gathering Company under the other contracts involved in the settlement, but not involved in the dispute here, apparently is transported by Gathering Company through its separate intrastate line.

the full prices thereunder.[6] Gathering Company answered this complaint, denying liability. Gathering Company also filed a motion in the court to stay proceedings therein pending Commission action on the subject petition. Consolidated later filed a motion to amend its complaint in the court action to include a cause of action based on fraud and deceit, essentially growing out of the facts summarized above.

The Court denied Gathering Company's motion to stay except with regard to the following stated issues, which it "referred to FERC for examination and determination on the basis of primary jurisdiction."

> "(a) Whether all or any portion of natural gas sold by Consolidated to Defendants pursuant to four (4) natural gas purchase contracts dated August 24, 1956, January 1, 1958, September 6, 1960, and November 26, 1960, as amended, is subject to the jurisdiction of FERC pursuant to the Natural Gas Act, the Natural Gas Policy Act, or rules and regulations promulgated in accordance therewith;
>
> "(b) In the event that all or any portion of such natural gas is subject to FERC jurisdiction, the applicable prices payable by Defendants to Consolidated under the referenced statutes and regulations, absent controlling principles of state law with respect to actions at law for fraudulent and deceitful conduct."

Gathering Company, in its petition for declaratory order, requests that the Commission issue an order declaring that the Commission has primary jurisdiction over this case; that the sales of gas by Consolidated at issue are not sales in intrastate commerce, but are sales in interstate commerce for resale subject to Federal rate regulation on that basis; and that Gathering Company cannot lawfully pay and Consolidated cannot lawfully collect

---

[6] *Consolidated Oil & Gas, Inc. v. Southern Union Company, et al.*, No. SF79-2161(c).

rates in excess of those allowed by Federal rate regulation. Gathering Company further requests that Consolidated be required to refund to it any rates paid by Gathering Company under the 1976 settlement which were in excess of Federally allowed rates.

We turn first to the questions raised by the Court. There is no real dispute as to the jurisdictional status of Consolidated's subject sales. Consolidated does not assert that these sales are outside this Commission's jurisdiction under the Natural Gas Act.[7]

The Supreme Court held in *F.P.C. v. Amerada Petroleum Corp.*, 379 U.S. 687 (1965), that where a supplier sells natural gas to an interstate pipeline company which commingles it with gas from other sources and uses some of the mixture intrastate but sells a substantial portion thereof in interstate commerce, the parties may not avoid the jurisdiction of the Commission by stipulating in their contract, that, contrary to the actuality of pipeline transportation, all the supplier's gas sold under the contract will be used intrastate. The case followed shortly after *California v. Lo-Vaca Co.*, 379 U.S. 366 (1965), which held essentially the same thing. Thus, we think it beyond doubt that all natural gas sold by Consolidated pursuant to the four contracts in question is subject to the jurisdiction of the Commission under the Natural Gas Act by virtue of the fact that Gathering Company commingles such gas with other gas and sells a portion of the commingled stream to El Paso for resale in interstate commerce.[8]

---

[7] Consolidated does question the applicability of the doctrine of primary jurisdiction here, as well as the Commission's authority to take control over a state court proceeding involving issues of alleged breach of contract and alleged fraudulent representation. These matters are discussed later in this order.

[8] It may be that some of the subject gas sold by Consolidated has become exempt from the provisions of the Natural Gas Act to Section 601(a)(1)(B) of the Natural Gas Policy Act of 1978

As to the Court's second question, the lawful rate for those sales is the contract rate or the applicable ceiling rate, whichever is lower. The permanent certificates issued to Consolidated covering sales under the Consolidated contracts were terminated and its rate schedules relating thereto cancelled after issue to Consolidated of a blanket certificate of public convenience and necessity in 1972. Therefore, this Commission does not have adequate information to calculate Consolidated's contract rates. We can, however, set forth the applicable ceiling rates. According to the pleadings, the time period involved in sales under the pertinent contracts is from January 1, 1974. During that period, the ceilings on small producer sales from the San Juan Basin in New Mexico, Rocky Mountain Area, are described below.

Under the small producer procedure, small producers were permitted to charge and collect their contract rates after promulgation of such procedure in 1971 by Order No. 428 (see footnote 4, supra).[9] However, small producers were precluded under Order No. 428 from using contract escalation clauses prohibited by subsections (a), (b), (b-1), and (c) of 18 C.F.R. § 154.93 (which would include favored nation clauses such as those in the Consolidated contracts) from collecting any rate in excess of the otherwise applicable ceiling price. That provision applied without regard to whether the contracts involved were executed before or after April 3, 1962. *See* Section 157.40(e), 45 FPC at 460-461.

During the period involved here, the producer rate ceilings applicable to the Rocky Mountain Area were:

(NGPA). However, any such exempted gas would remain subject to the applicable NGPA price ceiling unless deregulated in accordance with NGPA Section 121.

[9] A small producer was not limited to the just and reasonable ceiling rate where its contract rate exceeded that level until the issuance of Opinion No. 742-A on July 27, 1976 [56 FPC 637].

(1) 24.0 cents per Mcf at 14.73 psia for gas sold under contracts dated prior to October 1, 1968, which is produced from wells commenced on or before December 31, 1972, subject to applicable adjustments. Opinion No. 658, 49 FPC 924, issued April 11, 1973, as amended.

(2) 24.00 cents per Mcf at 15.025 psia for gas sold under contracts dated prior to October 1, 1968, which is produced from wells commenced after January 1, 1973, subject to applicable adjustments. Order No. 435, 46 FPC 68, issued July 15, 1971.

(3) Effective June 21, 1974, 50 cents per Mcf at 14.73 psia for gas sold from wells commenced on or after January 1, 1973, with one cent annual escalations on January 1 of each year (51 cents in 1975, 52 in 1976, *et seq.*), subject to applicable adjustments Opinion No. 699-H, 52 FPC 1604, issued December 4, 1974, as amended.[10] This rate was also available for gas sold under a replacement contract, *i.e.*, a contract replacing a prior contract where the prior contract expired of its own terms on or after January 1, 1973, or where the prior contract expired prior to January 1, 1973, but the replacement contract was executed on or after January 1, 1973.

(4) By Commission Opinion No. 742, 54 FPC 853, issued August 28, 1975, as amended, the Commission established just and reasonable rates for small producers at 130% of the large producer rates, effective as of August 28, 1975. Section 157.40(e), 54 FPC 853, 862-3, was amended to preclude use of prohibited indefinite pricing provisions (18 C.F.R. § 154.93) to exceed these new

---

[10] With the issuance of Opinion No. 699-H, the rate provided in Order No. 435 was superseded as of June 21, 1974, insofar as the subject sales are concerned, because any sales from wells commenced on or after January 1, 1973, would be entitled to the 50 cent rate provided in Opinion No. 699-H, in lieu of either the Order No. 435 rate or the 35 cent Rocky Mountain rate established in Opinion No. 699-H for contracts dated on or after October 1, 1968.

ceilings. The 24 cent rate under Opinion No. 658 thus rose to 31.2 cents per Mcf, subject to applicable adjustments; and the 51 cent rate under Opinion No. 699-H rose to 66.3 cents per Mcf, subject to applicable adjustments.

(5) Effective July 1, 1976, the 24.0 cents per Mcf rate prescribed by Opinion No. 658 referred to above was increased to 29.5 cents per Mcf at 14.73 psia, subject to applicable adjustments.[11] Opinion No. 749, 54 FPC 3080, issued December 31, 1975, as amended. By operation of Opinion No. 742, supra, this rate became 38.35 cents per Mcf for small producers, subject to applicable adjustments.

(6) Effective July 27, 1976, the small producer flowing gas rate, *i.e.*, the 38.35 cent rate described next above (130% x 29.5 cents per Mcf) was changed to 35 cents per Mcf at 14.73 psia, subject to applicable adjustments. Opinion No. 742-A, 56 FPC 637, issued July 27, 1976, as amended, and Order No. 553, 56 FPC 654, issued July 27, 1976, as amended.[12] The 35 cent rate is not subject to the 130% provision in Opinion No. 742.

(7) Effective July 27, 1976, the 52 cent rate then in effect under Opinion No. 699-H, described above, was increased to 93 cents per Mcf at 14.73 psia, subject to applicable adjustments, for gas from wells commenced on or after January 1, 1973, and prior to January 1, 1975. A January 1 one cent per Mcf annual escalation was provided, beginning January 1, 1977. The 130% provision in Opinion No. 742 was applicable to the 93 cent rate and yearly one cent escalations thereto, thus resulting in a rate of 120.9 cents per Mcf, which was in effect until

---

[11] In these situations where the Btu content of the gas exceeded 1021 Btu, the 23.5 cents per Mcf rate at 14.73 psia provided in Opinion No. 749, effective as of January 1, 1976, would be higher than the 24 cent rate under Opinion No. 658 because of differences in the permitted Btu adjustments under these opinions. The higher rate would be the applicable ceiling rate as of January 1, 1976.

[12] *See* 18 C.F.R. § 157.40(c)(1)(i).

January 1, 1977, when the rate would escalate 1.3 cents per Mcf. Opinion No. 770, 56 FPC 509, issued July 27, 1976, as amended; and Opinion No. 770-A, 56 FPC 2698, issued November 5, 1976, as amended.

(8) Also effective July 27, 1976, a rate ceiling of $1.42 per Mcf at 14.73 psia, subject to applicable adjustments, was prescribed for sales by both large and small producers from wells commenced on or after January 1, 1975. Quarterly one cent escalations were provided commencing October 1, 1976. Opinion Nos. 770 and 770-A, as amended, *supra*. The 130% provision in Opinion No. 742 did not apply to this vintage gas.

(9) Effective as of December 1, 1978, the ceilings prescribed in the NGPA apply. These rates are set forth in tabular form in 18 C.F.R. § 271.101. They escalate monthly pursuant to the monthly inflation adjustments provided in the NGPA.

We now turn to Gathering Company's petition. Gathering Company requests that this Commission assume jurisdiction of this case on the grounds of primary jurisdiction. In *Arkansas Louisiana Gas Company v. Hall*, 7 FERC ¶ 61,175, at p. 61,322, (1979),[13] the Commission held with respect to sales subject to its jurisdiction under the Natural Gas Act that:

> Whether the Commission should assert jurisdiction over contractual issues otherwise litigable in state courts, depends, we think, on three factors. These factors are: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and,

---

[13] Order affirmed in *Arkansas Louisiana Gas Company v. F.E.R.C.* D.C. Cir. Nos. 77-1146 and 79-2068 (unreported orders of October 19, 1981, and May 20, 1982).

(3) whether the case is important in relation to the regulatory responsibilities of the Commission.

Viewed by these standards, we see no reason to exercise jurisdiction over the contractual aspects of this case. As in *Arkla v. Hall*, the favored nations clauses is the Consolidated contracts do not require special expertise for their construction; there is no need for uniformity of construction; and the case is not important to the regulatory responsibilities of the Commission.

The filed rate doctrine, as such, does not specifically apply to any rate permitted under Consolidated's small producer certificate inasmuch as no rate filings are required thereunder.[14] But Consolidated is limited under its small producer certificate to its contract rate or to the applicable ceiling price, whichever is lower. Consequently, Consolidated would have no right under either the filed rate doctrine or its certificate authorization to collect a rate in excess of its contract rate or the applicable ceiling price, whichever is lower, in the absence of specific authority from this Commission.[15] If a court were to award damages for breach of contract on the basis of a rate in excess of that permitted under Consolidated's certificate, Consolidated would be required to seek specific authorization from this Commission before collecting any such rate.[16] No authorization would be required, however,

---

[14] Under the filed rate doctrine the utility "can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951).

[15] *Arkansas Louisiana Gas Company v. Hall*, 453 U.S. 571 (1981).

[16] Aside from the heavy burden Consolidated would have in justifying a higher rate, there would also be a serious question as to whether such higher rate, even if justified, could or should be made retroactively effective.

in the event the damages awarded by the court did not exceed the rate authorized under the certificate.[17]

We now turn specifically to the fraud allegations. Fraud, in additon to breach of contract, was considered in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 511 (1981), but was found not to exist. On this subject the Court said, p. 583:

> The court below did not find that Arkla intentionally failed to inform respondents of its lease payments to the United States in an effort to defraud them. Consequently, we are not faced with affirmative misconduct, and we need not consider the application of the filed rate doctrine in such a case.[18]
>
> * * *

[18] . . . We save for another day the question whether the filed rate doctrine applies in the face of fraudulent conduct.

Although the question of fraud has been raised by Consolidated in the current court litigation, that matter has not yet been resolved. If the court were to determine that there was fraudulent conduct on the part of Gathering Company in this case and that any damages relating thereto would have the effect of increasing Consolidated's rate above the applicable ceiling rate or above Consolidated's contractually authorized rate, whichever is lower, it would then become necessary to decide whether this Commission should exercise jurisdiction over such matters. In these circumstances, the court would have an opportunity to refer the question to this Commission. In the

[17] We have taken no action on Gathering Company's request to require Consolidated to make refunds of any rates paid in excess of the applicable ceiling rate under the 1976 settlement. Gathering Company has not supplied adequate information showing that there were any excess payments. Moreover, in any event, we presume that the Court will allow Gathering Company to offset whatever excess payments, if any, were made by Gathering Company against whatever damages, if any, are awarded Consolidated.

alternative, either Consolidated or Gathering Company would also have an opportunity to raise the issue in appropriate pleadings with this Commission.

The Commission orders:

(A) The Commission's response to the questions raised by the New Mexico State District Court is set forth in the body of this order.

(B) Gathering Company's request for declaratory order is granted to the extent provided in the body of this order.

(C) Consolidated's motion to intervene is granted subject to the Rules and Regulations of the Commission: *provided, however,* that its participation shall be limited to matters affecting asserted rights and interests as set forth in the motion to intervene; and *provided, further,* that its admission shall not be construed as recognition that it might be aggrieved by any order entered in this proceeding.

FEDERAL ENERGY REGULATORY COMMISSION

[¶ 61,350]

Docket No. C180-264-001

SOUTHERN UNION GATHERING COMPANY

Order Denying Rehearing and Motion for Consolidation and Hearing

---

(Issued March 22, 1985)

Before Commissioners: Raymond J. O'Connor, Chairman; Georgiana Sheldon, A. G. Sousa, Oliver G. Richard III and Charles G. Stalon.

On September 13, 1984, Consolidated Oil & Gas, Inc. filed a request for rehearing of the Commission's order entitled "Order Responding to Judicial Referral and Petition for Declaratory Order" issued in the above-captioned proceeding on August 20, 1984. 28 FERC ¶ 61,225. The Commission in that order held that four sales of natural gas by Consolidated to Southern Union Gathering Company (Southern Union) in San Juan County, New Mexico were sales for resale in interstate commerce and therefore subject to Commission jurisdiction under the Natural Gas Act. The Commission set forth the ceiling prices applicable to the sales, but elected not to exercise jurisdiction over contractual aspects of the case which were the subject of ongoing state court litigation initiated in 1974

by Consolidated against Southern Union in New Mexico. The Commission stated that Consolidated would have no right to collect a rate in excess of its contract rate or the applicable ceiling price, whichever is lower, in the absence of specific authority from the Commission.

In its request for rehearing, Consolidated challenges the August 20 order on numerous grounds, alleging that the order (1) improperly denies Consolidated a hearing, (2) contains factual errors, (3) is not based on substantial evidence, (4) represents an abuse of discretion, (5) attempts to seize authority" over the issue of possible damage awards, (6) represents an improper intrusion on state courts, and (7) represents an unsupported change in Commission policy. A review of the request for rehearing reveals three principal areas of controversy, namely (1) the jurisdictional issue, (2) the need for a hearing, and (3) the possible effect of the August 20 order on state court proceedings.

Jurisdiction

In the August 20 order, the Commission held the sales inu question to be jurisdictional because the gas purchased from Consolidated was commingled by Southern Union with other gas and resold in part to El Paso Natural Gas Company (El Paso) for resale in interstate commerce.[1] In support of this jurisdictional determination, the Commission relied upon *F.P.C. v. Amerada Petroleum Corp.*, 379 U.S. 687 (1965) and *California v. Lo-Vaca Co.*, 379 U.S. 366 (1965). These cases hold that where gas is sold to and commingled with the system

---

[1] Consolidated applied for and received in 1959 and 1963 certificates of public convenience and necessity for each of the four sales in question and thereafter continuously sold gas under these certificates to Southern Union. In 1972, Consolidated received a small producer certificate and its prior certificates and rates schedules were cancelled. The sales have continued under the small producer certificate.

supply of an interstate pipeline, the sale is jurisdictional even though the parties may purport to allocate the gas to non-jurisdictional sales or activities. Consolidated argues that (1) the *Amerada* and *Lo-Vaca* cases are inapplicable since a "substantial" portion of the gas is not sold in interstate commerce and Southern Union is a non-jurisdictional gathering company rather than an interstate pipeline, (2) the jurisdictional finding is in conflict with the Commission's order in *Columbia Gas Transmission Corp.*, 10 FERC ¶ 61,111 (1980), and (3) the jurisdictional finding is inconsistent with the intent of the parties.

Upon review of these arguments, the Commission finds they provide no basis for modifying the jurisdictional determination made in the August 20 order. Information submitted in this case shows that during the two-year period from March 25, 1976 to March 25, 1978, a total of 142,048,924 Mcf of gas flowed through Southern Union's facilities, of which 48,690,185 Mcf was sold to El Paso.[2] Furthermore, the fact that Southern Union is not an interstate pipeline is not controlling.[3] The fact remains that Consolidated's sales to Southern Union are sales for resale by Southern Union to El Paso for resale in interstate commerce. The sale of gas prior to gathering is jurisdictional if the sale is made in interstate commerce. *Deep South Oil Company of Texas v. F.P.C.*, 247 F.2d 882 (5th Cir. 1957), *cert. den.*, 355 U.S. 930 (1958); *United Gas Improvement Co. v. Continental Oil Co., et al.*, 381 U.S. 392 (1965). The *Columbia* case relied upon by Consolidated does not require a different result. In *Columbia*,

---

[2] Brief of Southern Union in support of petition for declaratory order, filed March 23, 1980, p. 4.

[3] In 1972, the Commission determined that Southern Union was an independent producer "engaged in the gathering of natural gas and the sale of natural gas in interstate commerce but is not engaged in the transportation of natural gas, other than gathering, by pipeline in interstate commerce." 47 FPC 1177, 1196 (1972).

the Commission held the sale of gas by a producer directly to a local distributor in the same state to be non-jurisdictional even though the gas was transported by an interstate pipeline for the distributor and commingled in the pipeline with interstate gas. The Commission thus refused to extend the *Lo-Vaca* commingling theory to a case in which it had jurisdiction over the transportation of the gas, but not over the sale of such gas. Here, Consolidated's gas is sold to Southern Union and resold by it to El Paso for resale in interstate commerce. Under these circumstances the *Columbia* exception to *Lo-Vaca* does not apply.

With regard to the question of intent, the Commission holds that the parties' intent is not a relevant factor in determining whether these sales are jurisdictional. The record in this case does not support the claim that Southern Union intended that the sales in question would be non-jurisdictional; its 1980 position for a declaratory order seeks a determination that the sales are jurisdictional. However, even assuming *arguendo* that both parties agreed that Consolidated's sales were non-jurisdictional, that fact would not be controlling. Jurisdiction must be determined based on the facts of the particular case and the application of legal principles to those facts. For the reasons set forth in the August 20 order and restated here, the sales under these four contracts are jurisdictional. That finding cannot be affected at this late date by controverted arguments about the intent of the parties.

In connection with the jurisdictional issue, the Commission takes note of the declaratory order issued on May 5, 1981, in Docket No. CI81-22-000, 15 FERC ¶ 61,132. In that order, the Commission held that Southern Union's participation in certain exchanges of natural gas with Northwest Pipeline Corporation (Northwest) and El Paso constituted gathering not subject to Commission jurisdiction pursuant to section 1(b) of the Natural Gas Act. In that case Consolidated, as an intervenor, had ex-

pressed concern about its jurisdictional status in the event the exchanges were found to be jurisdictional. (Consolidated makes nonjurisdictional as well as jurisdictional sales to Southern Union in the San Juan Basin). In its order, the Commission held that "In light of our determination that Southern Union is not jurisdictional in these circumstances, we believe that producers such as Consolidated, who sell gas to Southern Union in New Mexico, are also non-jurisdictional." 15 FERC at ¶ 61,301. This case in no way supports a determination that the four contracts at issue here are non-jurisdictional. The language quoted from the May 5, 1981 order was meant to allay producer concerns by confirming that the jurisdictional status of sales to Southern Union would not be affected by the exchanges to be made between Southern Union, Northwest and El Paso. To the extent such sales were non-jurisdictional they would remain so. However, the order was in no way intended and cannot reasonably be interpreted to mean that previously jurisdictional sales by producers to Southern Union would become non-jurisdictional as a result of the exchanges.

One final matter pertaining to the jurisdictional issue merits consideration. Consolidated states that Southern Union has agreed that sales made under the November 26, 1960 contract are, at least in part, non-jurisdictional. While it is true that certain sales under this contract are non-jurisdictional, that fact has no effect on the jurisdictional finding made in the August 20 order. Southern Union was not the original buyer under the November 26, 1960 contract, as well as two of the other contracts, but succeeded to the interest of the original buyer, Southern Union Company, its parent. Southern Union did not succeed to all of the parent company's interest under the November 26, 1960 contract; the parent remained the purchaser of gas from some of the acreage. This gas was not certificated by the Commission, is not sold to Southern Union, and is not involved in this proceeding. The jurisdictional finding applies only to gas sold under these contracts to Southern Union.

Need for a Hearing

Consolidated argues that it was denied due process of law because no formal hearing was held prior to issuance of the August 20 order. Consolidated argues that substantial and material facts remain to be determined and that a hearing is therefore required. A review of the request for rehearing, however, reveals that Consolidated has not alleged, except in the most general terms, the existence of factual issues alleged to require a hearing. Consolidated argues that "factual issues concerning the intent of the parties and of Gathering Company's facilities are in dispute . . ." (p. 14). At another point, Consolidated states that "the Commission's finding [concerning the price escalation clauses in the contracts] cannot be made without a hearing in which the parties' interpretation of the contracts are ventilated fully." (p. 20).

The Commission finds that a hearing is not required. Allegations such as those made by Consolidated do not mandate a formal hearing.[4] Consolidated has not shown thta disputed issues of material fact exist which would require a hearing. Consolidated has not demonstrated or even described any factual issues concerning Southern Union's facilities which would affect the jurisdictional determination. The Commission has found that the question of intent is not determinative of the jurisdictional issue. With regard to the issue of interpretation of the price escalation provisions of the contract, it is equally clear that a hearing is not required. In the August 20 order, the Commission noted that pursuant to Order No. 428, 45 FPC 454 (1971), small producers were permitted to collect their contract rates, but were precluded from using certain contract escalation clauses, including favored nations clauses of the type contained in the four

---

[4] Southern California Edison Co., 27 FERC ¶ 61,105 (1984); City of Ukiah, California v. F.E.R.C., 729 F.2d 793 (D.C. Cir. 1984); Cerre Wire & Cable Co., et al. v. F.E.R.C., 677 F.2d 124 (D.C. Cir. 1982).

contracts, to collect rates in excess of the otherwise applicable ceiling price. The only price escalation clauses permitted are those set forth in section 154.93 of the Commission's regulations. In the August 20 order the Commission reviewed the price escalation clauses in the four contracts and determined that they do not fall within any of the categories described in section 154.93 and are therefore prohibited. The Commission does not believe this conclusion involves a factual issue as to which there is or could be any genuine dispute. The clauses in question are clearly favored nations clauses and fall squarely within the prohibition of Order No. 428 and section 154.93 of the regulations.[5] To hold a hearing on this question would constitute a waste of time and is therefore unnecessary.

---

[5] The price escalation clause in the September 6, 1980 contract is quoted below. The other contracts have similar or identical clauses.

PRICE EQUALIZATION

> Any other provision in this agreement to the contrary notwithstanding, if at any time while this agreement remains in effect Buyer shall purchase at the wells gas which is produced within Northwestern New Mexico by any other(s) than Seller from the field and horizon which produces the gas purchased hereunder, at a higher price (including, for this purpose, Buyer's reimbursement, if any, of tax cost to such other seller(s)) than is being paid to Seller hereunder for gas produced from such field and horizon (including, for this purpose, Buyer's reimbursement, if any, of direct tax cost to Seller) and Seller's gas from such source delivered hereunder (1) is delivered under similar conditions, giving due consideration to quality, volume and pressure, and (2) is equivalent to or better than such other gas, then Buyer shall pay such higher price to Seller for its gas delivered hereunder from such source, for so long as it shall pay that price to such other(s). In determining whether any higher price is being paid by Buyer for purposes of this Article VIII the units of gas measurement shall be computed to the same pressure base and there shall be disregarded any excess or premium amounts paid or required to be paid on account of gas royalty or overriding royalty or on account of liquefiable hydrocarbon content specifically recognized.

Effect on State Court Proceedings

In its original petition of March 25, 1980, Southern Union requested the Commission to issue a declaratory order holding, among other things, that:

> Consolidated cannot lawfully receive and Gathering Company cannot lawfully pay prices for the gas sold under the Consolidated Contracts which are in excess of the maximum prices permitted under the provisions of such Acts [NGA and NGPA] and the Commission's regulations applicable to interstate sales of gas for resale.

In the August 20 order, the Commission granted Southern Union's request. 28 FERC at p. 61,427. The Commission also stated that in the event a court awarded damages to Consolidated for breach of contract on the basis of a rate in excess of that permitted under Consolidated's certificate, Consolidated would be required to seek authorization from the Commission before collecting such rate. The Commission stated that Consolidated would have a heavy burden to justify an above-ceiling rate and that a serious question existed as to whether such a rate could or should be made effective retroactively. 28 FERC at p. 61,428, n. 16. The Commission also held open the possibility that it would review any damages based on fraud. *Ibid.* at pp. 61,427-28.

Consolidated argues that these statements are unwarranted and represent an improper intrusion on the New Mexico District Court. Consolidated challenges the August 20 order on the following grounds: (1) the order improperly suggests that damages for breach of contract may not be awarded if the amount awarded results in a per unit of gas rate in excess of the applicable ceiling price, (2) the order implies that damages awarded for fraud or deceit may be reviewable by the Commission, (3) the order predetermines that any damages awarded would have the effect of raising Consolidated's rates

above the applicable ceiling, and (4) the Commission's statements concerning damages are at odds with the concept of tort law, where the issue is the conduct of a defendant rather than the price of a commodity.

Upon review of this matter, the Commission concludes that Consolidated's arguments do not warrant modification of the August 20 order. However, the Commission agrees that the language contained in the August 20 order may be to some extent misleading and open to a broader interpretation than was intended. The Commission will therefore clarify the matter. The August 20 order held that Consolidated would be required to seek Commission approval in the event a court were to award damages "on the basis of a rate in excess of that permitted under Consolidated's certificate." 28 FERC at p. 61,427. The Commission did not mean to imply by that statement that an award of damages based on breach of contract or other grounds would or would not be construed as exceeding the applicable ceiling price. The Commission will not speculate about such matters in the absence of an actual damage award.

It is not clear whether or, if so, when the issue of Commission authority in relation to an award of damages by a state court will come before the Commission. The Commission believes no useful purpose can be served by attempting to delineate in advance the issues which such a case would present or what action the Commission might take. Any Commission action would depend on a number of factors including the amount of damages, the basis for the damages, and the relevant facts and circumstances and applicable legal principles. We leave those matters for another day. It is sufficient for present purposes to state that in issuing the August 20 order the Commission did not intend either to waive its jurisdiction over Consolidated's sales and the rates at which those sales are made or to intrude upon the jurisdiction or authority of any state court.

Consolidated also argues that the August 20 order represents an unsupported change in Commission policy with regard to the exercise of primary jurisdiction. This claim is without merit. The Commission's policy is to rule on issues presented or referred to it in cases where the issues involve matters important to the Commission's regulatory responsibilities or as to which the Commission has special expertise. *United Gas Pipe Line Company*, Docket No. RP71-29, *et al.* (Phase III), 4 FERC ¶ 61,151 (1978); *Transcontinental Gas Pipe Line Corp.*, Docket No. TC79-8, 13 FERC ¶ 61,147 (1980). Absent these factors, or other special circumstances in a particular case, the Commission would not assert or accept jurisdiction over issues pending in state or federal courts. The August 20 order represents no departure from that policy. The issues ruled on in the August 20 order were referred by the state court to the Commission and are matters clearly within the Commission's primary jurisdiction. The Commission ruled that Consolidated's four sales, made under Commission certificates, were jurisdictional under the Natural Gas Act, stated the applicable ceiling prices, and stated that Consolidated is entitled to no more than the ceiling prices for these sales. These are issues central to the Commission's regulatory responsibilities. The Commission declined to exercise jurisdiction over any other issues involved in the state court proceedings.

The *United Gas Pipe Line Company* case, 27 FERC ¶ 61,015 (1984), relied on by Consolidated in support of its argument that the August 20 order represents a change in Commission policy, is not on point. In the *United* case, the Commission was requested by the plaintiff in a pending lawsuit against United to issue a declaratory order "clarifying the intent" of the Federal Power Commission in issuing Opinion Nos. 610 [47 FPC 245], 610-A [47 FPC 1021], 661 [50 FPC 181], and 661-A [50 FPC 779] in 1972 and 1973. The Commission declined to do so, stating that the court neither

needed nor wanted the Commission's assistance. The facts and circumstances present in *United* are clearly distinguishable from those in this case, and the *United* case is therefore not a valid precedent with respect to the August 20 order. Consolidated also claims that the Commission asserted jurisdiction herein in violation of our policies and precedents. We declined to take jurisdiction over the contractual aspects of this case under the precedent fully articulated in *Arkla v. Hall*, 7 FERC ¶ 61,175 (1979).[6]

Consolidated further alleges that our August 20 order runs counter to positions taken by the FERC recently in similar cases—*In re Tenneco Inc.*, No. 84-4074, (1984) and *In re Columbia Gas Transmission Corp.*, No. 84-3282, (1984) both before the Fifth Circuit. These cases involved situations where natural gas pipeline companies, alleging reduced demand for gas, instituted temporary or emergency programs to reduce gas costs and purchases from their producer-suppliers and to obtain relief from contractual obligations to pay such producer-suppliers for minimum volumes of gas whether taken or not. These matters are the subject of proceedings before the Commission. The producers involved sued under their gas purchase contracts. The pipeline companies sought to have the district judges refer to this Commission the issues regarding their purchasing programs under the doctrine of primary jurisdiction. Participating in these cases as *amicus curiae*, the Commission, *inter alia*, opposed these efforts on the ground that reference at that time would have disturbed the orderly proceedings of cases pending before the Commission involving similar issues, but not ripe for decision. The Court of Appeals refused to authorize referral of any issues in the District Court cases to the Commission.

---

[6] Order affirmed in *Arkansas Louisiana Gas Company v. F.E.R.C.*, D.C. Cir. Nos. 77-1146 and 79-2068 (unreported orders of October 19, 1981, and May 28, 1982).

Motion for Consolidation and Hearing

On December 21, 1984, Consolidated filed a motion requesting the Commission to consolidate this case with Southern Union's pending case in Docket No. GP84-55-000 for the purpose of hearing and decision. The GP84-55-000 case involves a petition filed on September 21, 1984, by Southern Union requesting the Commission to issue a declaratory order stating, among other things, that Southern Union does not require either certificate or abandonment authorization under the Natural Gas Act in order to sell to other parties gas which is in excess of El Paso's requirements. Consolidated argues that there are common issues of law and fact requiring consolidation of the proceedings for hearing. Consolidated points out that the two proceedings involve "the same gas, the same contracts, the same facilities, the same producers, the same purchaser and the same customers." Consolidated also argues there are common issues of law and policy, the "most critical" of which concerns the proper price to be charged by Southern Union for sales to parties other than El Paso.

On January 15, 1985, Southern Union filed an answer in opposition to Consolidated's motion for consolidation and hearing together with a motion for extension of time within which to file the answer. On January 31, 1985, Consolidated filed an answer to Southern Union's motion for extension of time. Consolidated opposes Southern Union's request for extension of time and argues that the granting of such an extension is contrary to usual Commission practices and that Southern Union failed to demonstrate good cause. Upon review the Commission finds no basis to reject Southern Union's answer. Southern Union has demonstrated good cause to permit its answer to be accepted for filing and such acceptance in no way prejudices the rights of Consolidated. On February 8, 1985, Southern Union filed a motion to strike those portions of Consolidated's January 31 answer which con-

tained arguments directed not to Southern Union's January 15 motion for extension of time but to its answer concurrently filed in opposition to Consolidated's motion for consolidation and hearing. Southern Union points out that under Rule 213(a)(2) Consolidated is not permitted to file an answer to Southern Union's January 15 answer unless permitted by the Commission. Upon review of this matter, the Commission will accept Consolidated's answer of January 31, 1985 for filing.

Consolidated's motion for consolidation and hearing will be denied. Consolidated presents no new facts or arguments based on Southern Union's petition in Docket No. GP84-55-000 which would lead to a different result on the jurisdictional issue in this case. Nothing in Southern Union's petition in GP84-55-000 or in Consolidated's motion for consolidation would support a finding that Southern Union's sale to El Paso is non-jurisdictional. The fact that El Paso's purchases from Southern Union are declining does not alter the jurisdictional finding. Issues concerning the Commission's price and certificate jurisdiction over sales by Southern Union to parties other than El Paso are raised by Southern Union's petition in GP84-55-000. Issues are also raised concerning the extent to which gas available to Southern Union is "dedicated" to El Paso. However, there is no issue raised concerning the fact that Southern Union's sales to El Paso are sales for resale in interstate commerce. This is true irrespective of possible future findings concerning the jurisdictionality of Southern Union's other sales or about the nature and extent of Southern Union's dedication of gas to El Paso. The issues raised by Southern Union's petition in GP84-55-000 are not common to the specific and very limited issues decided in the August 20 order. We have previously considered and rejected Consolidated's arguments that a hearing in this case is required. Consolidated's arguments in its motion of December 21, 1984 do not provide any basis for consolidation or hear-

ing with regard to the proceeding in Docket CI80-264-001.

In its answer of January 31, 1985, Consolidated introduces a new argument in support of its motion for consolidation and hearing. Consolidated argues that while the original 1953 contract between Southern Union and El Paso specifies that the gas to be provided to El Paso will be taken from the Pictured Cliffs and Mesaverde formations in San Juan and Rio Arriba Counties, New Mexico, the bulk of the gas produced by Consolidated under the subject contracts is from the Dakota formation. (Some of Consolidated's production is from the Mesaverde formation). The intended conclusion, apparently, is that Consolidated's Dakota production is not dedicated to interstate commerce under the contracts.

Consolidated's argument is without merit. The Southern Union-El Paso contract was amended by means of a supplement dated May 24, 1963, which deleted the relevant provisions of the 1953 contract (Article V, Section 1) and substituted a new provision specifying that the gas provided by Southern Union to El Paso would be withdrawn from the Pictured Cliffs, Mesaverde *and* Dakota formations.

The Commission orders:

Consolidated's request for rehearing of the August 20 order and its motion for consolidation and hearing are denied.

FEDERAL ENERGY REGULATORY COMMISSION

[¶ 61,359]

Docket No. GP86-2-000

SOUTHERN UNION COMPANY

Declaratory Order

(Issued June 19, 1986)

Before Commissioners: Anthony G. Sousa, Acting Chairman; Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

On October 16, 1985, Southern Union Company (Southern Union) filed a petition with the Federal Energy Regulatory Commission (Commission), pursuant to sections 4 and 16 of the Natural Gas Act (NGA),[1] sections 103 and 104 of the Natural Gas Policy Act of 1978 (NGPA),[2] and Rule 207 of the Commission's Rules of Practice and Procedure.[3] Southern Union seeks a declaratory order from the Commission that a tort damage award by the District Court of Santa Fe County, State of New Mexico in *Consolidated Oil and Gas Co. v. Southern*

[1] 15 U.S.C. §§ 717c and 717o (1982).

[2] 15 U.S.C. §§ 3313-3314 (1982).

[3] 18 C.F.R. § 385.207 (1985).

Union Co.[4] cannot lawfully be collected because the damages represent an unlawful increase over the NGPA ceiling prices. Southern Union also seeks a refund of that portion of a lump sum payment which it asserts is attributable to rates exceeding applicable NGPA ceiling prices made in connection with a 1976 Settlement Agreement. For the reasons set forth below, the Commission finds that the court-awarded damages are tort damages and do not constitute unlawful adjustments in the rates collected under gas purchase contracts. The Commission finds further that Southern Union has failed to supply adequate information warranting a refund of any portion of the lump sum payment made in the 1976 Settlement Agreement.

Background

Southern Union purchases gas from Consolidated Oil and Gas Co., Inc. (Consolidated), a small producer in the San Juan Basin area of New Mexico, as well as from a number of other producers located in the same area. The commingled gas stream is sold by Southern Union in both intrastate and interstate commerce. In September 1974, Consolidated and a number of other producers filed suit in the New Mexico state district court for breach of contract against Southern Union, alleging that certain favored nations pricing provisions in intrastate gas contracts had been activated, entitling these producers to higher gas prices. While the New Mexico state district court's decision on the merits was on appeal, the parties entered into a settlement agreement which provided for higher prices under the disputed contracts and included a lump sum payment relative to past sales made under these contracts (1976 Settlement Agreement).

In 1979, Consolidated filed suit against Southern Union in the New Mexico state district court alleging breach of

---

[4] No. SF79-2161(c) (N.M. Dist. Ct. July 12, 1985), *appeal docketed*, No. 79-2161(c) (N.M. Sup. Ct. August 9, 1985).

the 1976 Settlement Agreement and arguing that Southern Union had failed to pay the full price for gas established in the 1976 Settlement Agreement. This complaint was later amended to include actions for fraud and deceit. Southern Union denied liability and, on March 25, 1980, petitioned the Commission to issue a declaratory order that the Commission had primary jurisdiction over the case, that Consolidated's sales of gas at issue were not sales in intrastate commerce but sales in interstate commerce for resale subject to Commission rate regulation, and that Consolidated could not lawfully collect rates in excess of those allowed under Commission rate regulation. Southern Union argued in its petition to the Commission that at the time of the 1976 Settlement Agreement, there was a mutual mistake by the parties that all the gas was to be sold in intrastate commerce, and therefore, was not subject to the Commission's jurisdiction. Southern Union argued that, in fact, gas under four of these contracts was sold in interstate commerce and was therefore subject to Commission jurisdiction and rate regulation. According to Southern Union, these four contracts had been mistakenly included in the 1976 Settlement Agreement. Southern Union's refusal to honor the settlement prices for gas purchased under these four contracts was based on its assertion that these prices are higher than the applicable NGPA ceiling prices. In its 1980 position to the Commission, Southern Union also sought a refund of that portion of the lump sum payment paid to Consolidated under the 1976 Settlement Agreement which it alleges is in excess of the Commission's maximum lawful rates.

At the time of its 1980 petition to the Commission, Southern Union also filed a motion for stay in the New Mexico state district court pending Commission action on its petition. The New Mexico state district court denied Southern Union's motion for stay, but referred two issues to the Commission for examination and determination on the basis of primary jurisdiction. The New Mexico state district court requested the Commission to determine

whether any of the gas under the four disputed contracts was, in fact, subject to Commission jurisdiction, and, if so, what rates could be paid by Southern Union to Consolidated, absent controlling principles of state law for fraudulent and deceitful conduct.

The Commission's order, issued August 20, 1984, declared that because Southern Union had commingled the gas with other gas and sold a portion of the commingled stream for resale in interstate commerce, all natural gas sold by Consolidated under the four disputed contracts was subject to Commission jurisdiction under the NGA.[5] Noting that Consolidated's sales under the disputed contracts were covered by a small producer blanket certificate of public convenience and necessity issued in 1972, the Commission declared that the lawful rate for these sales is the contract rate or the applicable NGPA ceiling rate, whichever is lower. While the Commission did not have adequate information to calculate Consolidated's contract rates, the Commission did provide the New Mexico state district court with the applicable NGPA ceiling rates on small producer sales in the related area for the time period involved under the disputed contracts. The Commission denied Southern Union's request to exercise primary jurisdiction over the contractual aspects of the case. However, the Commission did declare that if the New Mexico state district court were to award damages for breach of contract on the basis of a rate in excess of that permitted under Consolidated's certificate, Consolidated would be required to seek specific Commission authorization before collecting the rate. The Commission also noted that if the New Mexico state district court found fraud on the part of Southern Union and awarded damages which would have the effect of increasing Consolidated's rate above the applicable ceiling rate or above Consolidated's contractually authorized rate, whichever is lower, it might become necessary for the

[5] 28 FERC ¶ 61,225, at p. 61,425.

Commission to decide whether to exercise jurisdiction. Pointing out that the New Mexico state district court had not reached a decision on the merits, the Commission concluded that either the New Mexico state district court could refer this issue to the Commission or the parties could petition the Commission at the conclusion of the case.

On March 22, 1985, in an order denying rehearing and motion for consolidation and hearing submitted by Consolidated, the Commission again addressed the possibility of Commission action in the event the New Mexico state district court awarded damages based on fraud.[6] Declining to modify its August 20, 1984 order, the Commission emphasized that it did not intend either to waive its jurisdiction over Consolidated's sales or rates, or to intrude on the jurisdiction of the New Mexico state district court. The Commission declared that any Commission decision on the issue of whether an award of damages would be construed as exceeding applicable NGPA ceiling prices would await an actual damage award. Leaving this matter for another day, the Commission noted that any decision would depend on a number of factors including the amount of damages, the basis for the damages, as well as the relevant facts and circumstances and applicable legal principles.[7]

On July 12, 1985, the New Mexico state district court, exercising its jurisdiction with respect to the construction of the parties' 1976 Settlement Agreement and the common law tort claim, found that Southern Union had made negligent misrepresentations which Consolidated had relied upon to its detriment. The court awarded Con-

---

[6] 30 FERC ¶ 61,350, at p. 61,710.

[7] Consolidated has petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the Commission's August 1984 and March 1985 orders. *Consolidated Oil and Gas Co. v. F.E.R.C. appeal docketed,* No. 85-1191 (D.C. Cir. June 17, 1985).

solidated $11,023,967 in damages and pre-judgment interest.[8]

Southern Union's Petition

Southern Union's October 1985 petition requests the Commission to determine whether these damages represent an increase over the ceiling rates applicable to gas sold under the disputed contracts which Consolidated cannot lawfully collect. Southern Union also requests the Commission to order a refund of that portion of the lump sum payment in the 1976 Settlement Agreement attributable to rates in excess of applicable NGPA ceiling prices.

In its 1985 petition Southern Union points out that the trial court judge, using a benefit-of-the-bargain standard, based the damage award on a damage study prepared by Consolidated. Southern Union notes that Consolidated arrived at the figures shown in the damage study by subtracting the interstate ceiling prices applicable to gas sold under the disputed contracts from the higher intrastate prices specified in the 1976 Settlement Agreement. According to Southern Union, the court's damage award would therefore allow Consolidated to collect amounts in excess of the previously determined interstate ceiling prices for jurisdictional gas sold in interstate commerce.

According to Southern Union, the applicable legal principles flow from *Arkansas Louisiana Gas Co. v. Hall*, a 1981 Supreme Court case which overturned a damage award in a breach of contract action filed in a Louisiana state court.[9] The Supreme Court declared that the filed rate doctrine, which forbids a regulated entity from charging rates for its service other than those properly

---

[8] Southern Union has appealed the New Mexico state district court's decision to the New Mexico Supreme Court, *Consolidated Oil and Gas Co. v. Southern Union Co., appeal docketed* No. 79-2161(c) (N.M. Sup. Ct., August 9, 1985).

[9] 453 U.S. 571 (1981).

filed with the regulatory agency, prohibits the award of damages for breach of contract where such an award would make the price paid for the gas exceed the rate on file. According to Southern Union, the Commission recognized this precedent in its August 1984 order declaring that while the filed rate doctrine technically does not apply to rates permitted under small producer certificates, Consolidated is foreclosed from collecting a rate higher than the applicable ceiling price absent specific authority from the Commission.[10] Pointing out that Consolidated did not proceed to trial seeking damages for breach of contract, Southern Union argues that in rejecting Consolidated's fraud theory, the New Mexico state district court's decision removes this case from the one exception recognized by the Supreme Court in the *Hall* case, damages awarded for fraud or other affirmative misconduct.

In its petition, Southern Union attempts to distinguish the instant case from *Gulftide Gas Corporation*,[11] a 1985 order in which the Commission declared that collection of certain punitive and actual damages awarded to a gas producer did not violate the maximum lawful price provisions of the NGPA. Southern Union notes that the damage award in *Gulftide* was for fraudulent misrepresentation and was not based on the price paid for gas. Southern Union also notes that the gas involved in *Gulftide* was NGPA section 105 gas which derives ceiling prices based on contract prices. According to Southern Union, the Commission in *Gulftide* concluded for these reasons that the actual damages reflect the parties' contract price, not exceeding the NGPA ceiling price and that, therefore, the damage award did not amount to an impermissible collection of a price in excess of that permitted for the first sale of gas under the NGPA. In its petition, Southern Union points out that the New Mexico state district

---

[10] 28 FERC ¶ 61,255, at p. 61,427.

[11] 31 FERC ¶ 61,228 (1985).

court rejected Consolidated's fraudulent misrepresentation claim and awarded no punitive damages. Southern Union also argues that the intrastate prices which were the basis for the damage award in this case exceed the interstate ceiling prices which the Commission has determined are applicable to the disputed contracts.

According to Southern Union, the New Mexico state district court's award of damages invades the Commission's exclusive jurisdiction to establish rates to be charged by Consolidated for the sale of natural gas for resale in interstate commerce. Southern Union argues that the damage award is tantamount to payment of an intrastate price for jurisdictional gas sold in interstate commerce conflicting with Congress and the Commission's power to set and regulate interstate gas sales and rates.

Finally, Southern Union requests the Commission to declare that the portion of the 1971 Settlement Agreement lump sum payment which it asserts represents an improper rate increase should be refunded. According to Southern Union, this portion totals $194,421.63, subject to audit.

The petition was noticed in the *Federal Register on* November 25, 1985.[12] Consolidated intervened and filed an answer to Southern Union's petition for a declaratory order.

Consolidated's Answer

Consolidated's answer raises six arguments in opposition to Southern Union's petition for a declaratory order. Consolidated's initial argument is that Southern Union's petition is premature and infringes on appellate court proceedings. Consolidated argues that not only does Southern Union's petition violate the terms of the Commission's prior order, but also that any Commission ac-

---

[12] 50 Fed. Reg. 48,471.

tion at this time would violate the review provisions of the NGA. According to Consolidated, Commission action on Southern Union's request at this time will result in administrative waste and inefficiency.

Consolidated's second argument requests the Commission to follow its own precedents and defer to the New Mexico state district court in this proceeding. Consolidated contends that the Commission should apply its policy of avoiding interference in pending litigation. Consolidated particularly points to the Commission's well-established policy of deferring to the courts concerning contract interpretation questions.

Third, Consolidated argues that the Commission lacks jurisdiction to consider Southern Union's petition. According to Consolidated, the Commission does not have independent statutory authority to review state settlement agreements. Consolidated argues that the State of New Mexico has exclusive authority to determine damages for tortious misconduct.

Declaring that *Arkansas Louisiana Gas Co. v. Hall* does not apply to common law tort damages, Consolidated's fourth argument emphasizes that state common law tort damage awards for negligent misrepresentation are not subject to Commission review. Consolidated points out that the New Mexico state district court's judgment is based on tortious misconduct relating only to the 1976 Settlement Agreement and, therefore, the tort damage award is beyond the Commission's review authority.

Fifth, Consolidated argues that the Commission cannot order Consolidated to refund any lump payments made to Consolidated at the time of the 1976 Settlement Agreement, pointing out that the New Mexico court found that Southern Union had not proved its counterclaim for the lump sum refund. Consolidated notes that the Commission denied Southern Union's request for a re-

fund in its August 1984 order because Southern Union had failed to supply adequate information showing that there were excess payments.[13] According to Consolidated, Southern Union has not provided adequate information in this petition to warrant Commission consideration of this request.

Consolidated's final argument declares that Southern Union's petition violates principles of estoppel. According to Consolidated, Southern Union is attempting to re-try issues which have already been fully litigated.

Consolidated concludes that, because of the premature nature of Southern Union's request, the Commission's policy of not intruding in ongoing court litigation, its lack of jurisdiction over common law tort matters, and the paucity of both legal and factual support for Southern Union's request, the Commission should deny or dismiss Southern Union's petition for a declaratory order.[14]

Commission Decision

The Commission finds that the damages awarded Consolidated by the New Mexico state district court do not violate the maximum lawful price provisions of the NGPA. The award of damages in this case does not amount to an impermissible regulation of the first sale of natural gas in violation of the NGPA.

In the March 1985 order, the Commission refused to speculate whether an award of damages based on breach of contract or other grounds would be construed as exceeding the applicable ceiling rate in the absence of an actual damage award. The July 12, 1985 decision of the trial court with its findings of fact and conclusions of law contains an actual damage award sufficient to permit the

---

[13] 28 FERC ¶ 61,225, at p. 61,424, n.17.

[14] Consolidated also filed a motion to dismiss or in the alternative, to refer action on Southern Union's petition for a declaratory order.

Commission to address this issue at this time. The Commission rejects Consolidated's arguments that a decision is premature until final resolution of both of the appellate proceedings related to this case. The decision in this order will have no bearing on either the issue of jurisdiction currently before the United States Court of Appeals for the District of Columbia Circuit or the appeal of the trial court's decision currently before the New Mexico Supreme Court.[15]

The Commission notes that the trial court's decision focused on the construction of the 1976 Settlement Agreement and common law tort claims. The trial court found that Southern Union owed a duty to Consolidated to provide truthful and accurate information concerning the resale destination of gas covered by disputed contracts, that Southern Union breached this duty and negligently made representations to Consolidated that were not true, that Consolidated relied to its detriment on these representations and entered into a settlement agreement dismissing its lawsuit against Southern Union and releasing its claims against Southern Union and finally, that as a direct and proximate cause of Southern Union's conduct, Consolidated had been damaged in the amount of $8,427,978 plus pre-judgment interest in the amount of $2,595,919.[16] The decision and the damages awarded by New Mexico state district court sound in tort, not contract. The court did not attempt to determine whether the contracts were interstate or intrastate or whether, in fact, Consolidated was entitled to an interstate or intrastate rate. Rather, the court's decision focused on the conduct of the parties.

---

[15] Consolidated raised the same arguments in its motion to dismiss or to defer. For the reason stated in the textual paragraph accompanying this footnote, Consolidated's motion is denied.

[16] *Consolidated Oil & Gas Co. v. Southern Union Co.*, No. SF79-2161(c), slip op. at 8-9 (First Judicial District, County of Santa Fe, State of New Mexico, July 12, 1985).

Recently, in *Gulftide Gas Corp.*,[17] a case also involving court-awarded damages based on tortious misrepresentations, the Commission determined that court-imposed tort damage awards do not represent rate payments in excess of prevailing Federal price ceilings. In *Gulftide*, the Commission declared that the award of tort damages, whether exemplary or actual, does not conflict with NGPA maximum lawful prices.[18] There is nothing presented in the facts in this case to warrant the Commission reaching a different conclusion. The Commission rejects Southern Union's arguments distinguishing *Gulftide* from the facts in this case. The category of the gas involved in *Gulftide* and this case is not dispositive of whether court-awarded damages arising in tort actions will conflict with the NGPA. It is the nature of the court action, not the category of the gas involved in the litigation, which determines whether the damages conflict with Title I of the NGPA. The Commission also rejects Southern Union's attempt to distinguish the court's finding of fraudulent misrepresentation in *Gulftide* with the court's finding of negligent misrepresentation in this case. The actions are both tortious in nature and relate to the conduct of the parties, rather than their performance of contractual obligations. The Commission finds that the tort damages in both cases are not part of the price paid for natural gas.

Further, the Commission rejects Southern Union's argument that the benefit-of-the-bargain measure of damages used in this case will permit Consolidated to collect prices in excess of the previously determined interstate ceiling price for jurisdictional gas sold in interstate commerce. Damages by their very nature must be based on sums certain and they may not be speculative. The trial court is not precluded from determining that the

---

[17] 31 FERC ¶ 61,288 (1985).

[18] *Id.* at p. 61,596.

damages were the amount equal to the difference between what Consolidated was paid by Southern Union under the Settlement Agreement and the amount Consolidated would have been paid had the representations of Southern Union been true.[19] The Commission finds that the New Mexico state district court's award of damages was not based on any assumption that Consolidated was necessarily entitled to an intrastate rate over the interstate rate. Rather, the court focused on the tortious conduct of Southern Union which resulted in Consolidated acting to its detriment. The fact that the court used the price differential between the interstate and intrastate rates to determine the damages does not negate the court's finding of tortious misconduct from which these damages arise.

Arkansas Louisiana Gas Co. v. Hall is not apposite in this case. The Supreme Court's decision, that a Federally regulated seller of natural gas is precluded from collecting an award of damages in a breach of contract action filed in a Louisiana state court, was based on the filed rate doctrine. The Commission is not addressing the filed rate doctrine in this case. Rather, the Commission is addressing the issue of whether damages awarded in an action based in tort violate the maximum lawful price provision of the NGPA.

Finally, the Commission finds that Southern Union has not supplied adequate information showing that it made any excess payments. Therefore, the Commission denies Southern Union's request to require Consolidated to make refunds of rates paid in excess of the applicable ceiling rate under the 1976 Settlement Agreement.

The Commission orders:

(A) The tort damage award made by the District Court of Santa Fe County, State of New Mexico in *Consoli-*

---

[19] *Consolidated Oil and Gas Co. v. Southern Union Co.*, No. SF79-2161(c), slip op. at 8 (N.M. Dist. Ct., July 12, 1985).

dated Oil and Gas Co. v. Southern Union Co. does not represent rates in excess of applicable NGPA ceiling prices.

(B) Southern Union's request for a refund of that portion of the lump sum payment made under the 1976 Settlement Agreement is denied.

(C) Consolidated's motion to dismiss or, in the alternative, to defer action on Southern Union's petition for declaratory order is denied.

FEDERAL ENERGY REGULATORY COMMISSION

[¶ 61,212]

Docket No. GP86-2-001

SOUTHERN UNION COMPANY

Order Denying Rehearing

(Issued May 27, 1987)

Before Commissioners: Martha O. Hesse, Chairman; Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

On July 21, 1986, Southern Union Company (Southern Union) filed a request for rehearing of the order issued in this proceeding on June 19, 1986, 35 FERC ¶ 61,359 in which the Commission held that tort damages ordered by the District Court of Santa Fe County, State of New Mexico, to be paid by Southern Union to Consolidated Oil & Gas, Inc. (Consolidated) do not constitute an unlawful increase in applicable NGPA ceiling prices.[1] The Commission also found that Southern Union failed to supply adequate information to warrant requiring Consolidated to refund any portion of a lump sum payment made by Southern Union to Consolidated pursuant to a 1976 settlement of a separate state court action.

---

[1] *Consolidated Oil and Gas, Inc. v. Southern Union Co.*, No. SF79-2161(c) (N.M. Dist. Ct. July 12, 1985), *appeal docketed*, No. 79-2161(c) (N.M. Sup. Ct. Aug. 9, 1985).

In its request for rehearing, Southern Union asserts that the Commission's June 19 order erroneously relies on a distinction between tort and contract causes of actions in determining whether a state court damage award conflicts with federal authority. Southern Union characterizes the Commission's decision as a "snapshot" of the case and claims the Commission failed to make an examination of the case as a whole. Southern Union states that even though "artfully pleaded," a state claim cannot preempt federal jurisdiction where the substance of that claim is "inextricably intertwined" with a transaction subject to exclusive federal regulation.

Southern Union contends that the Commission improperly concluded that *Arkansas Louisiana Gas Company v. Hall*, 453 U.S. 571 (1981) (*Arkla*) dealing with the filed rate doctrine is inapplicable to the facts and issues presented in this case and represents an arbitrary departure from the Commission's earlier orders in this case which recognize that *Arkla* governs. Southern Union further claims that the state court action and resulting damage award encroaches on the Commission's exclusive domain, and that the order of June 19 represents an unlawful abdication of Commission responsibility under the NGA and NGPA. Southern Union asserts that by ignoring the nature and substance of Consolidated's state court claim, the Commission improperly ratified Consolidated's unlawful attempt to circumvent the requirements of the NGA and NGPA.

The Commission's June 19 decision is based primarily on *Gulftide Gas Corporation*. 31 FERC ¶ 61,288 (1985), in which the Commission declared that the award of exemplary or actual damages in a fraudulent misrepresentation case did not conflict with the NGPA's maximum lawful prices. The Commission found the facts of *Gulftide* similar to those of this case and held that the damages awarded to Consolidated were not part of the price paid for natural gas purchased by Southern Union

from Consolidated. In making that determination, the Commission reviewed Consolidated's state court damage award, including the amount of damages, the basis for the damages, as well as the relevant facts and circumstances and applicable legal principles.

The arguments presented by Southern Union represents a restatement of arguments previously raised and rejected by the Commission in the order of June 19. Southern Union has presented no new facts or arguments which would warrant modifying that order and the request for rehearing should accordingly be denied.

The Commission orders:

Southern Union's request for rehearing is denied.

FEDERAL ENERGY REGULATORY COMMISSION

[¶ 61,203]

Docket No. GP86-2-002

SOUTHERN UNION COMPANY

Order Reaffirming and Clarifying Prior Orders

(Issued November 20, 1987)

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

On June 19, 1986, the Commission issued a declaratory order in the above-referenced docket holding that a New Mexico state court decision requiring Southern Union Company (Southern Union) to pay to Consolidated Oil & Gas, Inc. (Consolidated) $8,427,978 plus $2,595,989 in prejudgment interest as damages for negligent misrepresentation in a contract dispute did not violate federal natural gas price ceilings and could therefore be lawfully collected by Consolidated. 35 FERC ¶ 61,359. Rehearing was denied on May 22, 1987. 39 FERC ¶ 61,212.

The Commission's orders were appealed by Southern Union to the United States Court of Appeals for the District of Columbia Circuit. Because of reservations concerning the legal sufficiency of the June 19 order and the correctness of its holding, the Commission on September 3, 1987, filed with the court a motion requesting deferral

of the filing of the record pending Commission reconsideration of the case. On September 24, 1987, the court granted the Commission deferral of filing until November 23, 1987. However, since the record has not yet been filed, the Commission retains authority to act in the matter pursuant to section 19 of the Natural Gas Act. Based on further consideration of the New Mexico state court decision and particularly the 1976 settlement which gave rise to the state court proceedings, the Commission concludes that the June 19 order is correct. For the reasons set forth in the following discussion, the Commission holds that the state court judgment does not result in a violation of FPC ceiling prices and Congressionally mandated maximum lawful prices under the Natural Gas Policy Act of 1978 (NGPA).

The facts giving rise to Southern Union's request for a declaratory order are set forth in detail in the order of June 19 and will only be summarized here in pertinent detail. Southern Union purchases gas from Consolidated and other producers in the San Juan Basin area of New Mexico. The commingled gas stream is sold by Southern Union in both inter and intrastate commerce. The contracts under which the gas was sold contained favored-nations clauses which generally required Southern Union to pay Consolidated prices equal to the highest prices paid to any producer in the San Juan Basin. During the 1970's as the gas shortage emerged, the favored-nation clauses triggered prices for intrastate sales in excess of the interstate ceiling prices established by this Commission. In 1974 Consolidated and other producers sued Southern Union for breach of contract, claiming higher prices resulting from activation of the favored-nations clauses. This case was resolved through a 1976 settlement agreement which provided for payment of higher prices by Southern Union. Erroneously included among the contracts subject to the settlement were four contracts under which Consolidated made jurisdictional (interstate)

sales to Southern Union and for which it had previously been issued certificates of public convenience and necessity by the FPC.[1] These sales were thus subject to prevailing FPC regulated prices and later the applicable maximum lawful prices established under sections 103 and 104 of the NGPA. These prices were lower than the prices agreed to by Southern Union in the settlement.

Southern Union refused to honor the 1976 settlement with respect to the four jurisdictional contracts, and in 1979 Consolidated filed suit against Southern Union for breach of the settlement agreement. This complaint was later amended to include action for misrepresentation, fraud and deceit. This action culminated on July 12, 1985, in the $8,427,978 plus interest judgment which is the subject of the present dispute between the parties and of this order. The decision of the New Mexico District Court was based on a determination under tort law that Southern Union's inclusion of the four disputed contracts in the 1976 settlement constituted negligent misrepresentation to Consolidated that it was entitled to intrastate prices for sales made under those contracts and that Consolidated relied on the misrepresentation.[2] On October 16, 1985, Southern Union filed its petition for a declaratory order holding that the judgement constituted a violation of applicable federal ceiling prices and therefore could not lawfully be collected by Consolidated.

---

[1] The jurisdictional nature of these sales was confirmed by the Commission in an order issued August 20, 1984, in Docket No. CI80-264-000, 28 FERC ¶ 61,225, rehearing denied March 22, 1985. 30 FERC ¶ 61,350. These orders were affirmed in *Consolidated Oil & Gas, Inc. v. FERC*, 806 F.2d 275 (D.C. Cir. 1986).

[2] This decision was affirmed by the Supreme Court of New Mexico. On September 25, 1987 Consolidated filed copies of the decisions of the New Mexico District Court and Supreme Court and moved that they be lodged in the record of this proceeding. The motion is granted.

In its October 16, 1985 petition for a declaratory order, Southern Union relied primarily on the case of *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) (*Hall*). In *Hall*, the Supreme Court held that *Hall et al.*, Louisiana producers, were precluded from recovering a breach of contract judgment entered by a Louisiana state court. That judgment was based on the Louisiana court's determination that the *Hall* producers were entitled to a higher price for their gas than they had received from the purchaser, Arkansas Louisiana Gas Company, by virtue of the operation of the favored-nations clause in the Hall contracts. The Supreme Court disallowed the judgment on the ground the state court judgment would result in a rate different from that on file with the Commission. The Court held that in granting the judgment, the state court had "usurped a function that Congress has assigned to a federal regulatory body. This the Supremacy Clause will not permit." 453 U.S. at 582.[3] The Court went on, however, to leave open the possibility of a different result in a case involving "affirmative misconduct," 453 U.S. at 583, stating that "we save for another day the question of whether the filed rate doctrine applies in the face of fraudulent conduct." *Id.* at n.12.

In its June 19 declaratory order, the Commission rejected Southern Union's reliance on *Hall*. It found *Hall* to be inapposite because it involved a breach of contract action and was based on the filed rate doctrine, whereas the dispute between Southern Union and Consolidated involved the issue of whether state court damages awarded in an action in tort violate applicable federal price ceilings for natural gas. The Commission instead

---

[3] Hall subsequently became entitled to the state court judgment when this Commission waived the notice requirements of section 4 of the NGA and thereby allowed Hall's revised rate to be effective retroactively based on the order of the D.C. Circuit in *Frank Hall v. FERC*, 691 F.2d 1184 (5th Cir. 1982). The approved rates did not exceed applicable for ceiling prices. The case was ultimately settled. 31 FERC ¶ 61,057 (1985).

relied on its earlier decision in *Gulftide Gas Corp.*, 31 FPC ¶ 61,288 (1985), in which the Commission held that the award of exemplary tort damages did not conflict with NGPA maximum lawful prices. The actual damages in *Gulftide* did not exceed the ceiling price because under the well category involved there, the contract price was the ceiling price. The Commission rejected Southern Union's attempts to distinguish between the finding of fraudulent misrepresentation in *Gulftide* and the New Mexico court's finding of negligent misrepresentation. The Commission held that the actions "are both tortious in nature and relate to the conduct of the parties, rather than their performance of contractual obligations." 35 FERC at p. 61,822. The Commission concluded that tort damages are not part of the price paid for natural gas. Consequently, the Commission held that the fact that the damages awarded Consolidated were based on the difference between the interstate prices received by Consolidated and the higher intrastate prices provided for under the settlement did not result in Consolidated's realizing prices in excess of applicable interstate ceiling prices. The Commission reaffirmed these conclusions in denying rehearing.

Upon further consideration of this matter, the Commission concludes that the result of the June 19 declaratory order is correct, but its reasoning should be clarified. We reach this conclusion for several reasons. First, we have reviewed the *Gulftide* order and find that because the facts in *Gulftide* differ from those in this case, the general principle of *Gulftide*, that exemplary tort damages do not violate federal natural gas price ceilings, does not control this case. *Gulftide* involved an award of exemplary damages of over $1 million for fraudulent misrepresentation and actual damages of approximately $62,800, (plus interest and attorney fees). It is reasonable to conclude that exemplary or punitive damages do not constitute payments for gas and therefore do not

conflict with federal price ceilings. As pointed out in *Gulftide*, "exemplary damages are sums of money assessed in such amounts as are appropriate under the facts as punishment for wrongdoing and as an example for the good of the public." 31 FERC at p. 61,595 (quoting the trial judge). In this case, however, no exemplary damages are involved. While the New Mexico trial judge noted that there was some evidence of fraud, he declined to find Southern Union guilty of fraud. On review of the trial judge's findings, the Supreme Court of the State of New Mexico affirmed the lower court.

In resolving the central question of whether the damages awarded by the New Mexico court for negligent misrepresentation do or do not represent payments for gas sold by Consolidated to Southern Union under the four jurisdictional contracts, the Commission concludes that it is sufficient on the specific facts of this case to allow Consolidated to collect its state court judgment. The judgment award in this case was given to Consolidated because the state court found that Consolidated, by relying on Southern Union's negligent misrepresentation, gave up valuable consideration by not pursuing its court claim and suffered damages as a result. As the New Mexico Supreme Court pointed out, the events in question here do not involve a situation where Southern Union agreed to buy and Consolidated agreed to sell certain amounts of gas at certain prices. Had that been the case, the damages would be for the price of gas, and impermissible. Here, instead, the damages represent what was suffered by Consolidated as a result of a misrepresentation in the context of a settlement of a claim under state jurisdiction which is clearly a matter of state concern. Therefore, the state court awarded monetary damages to compensate Consolidated for the harm it suffered.

Thus, the facts surrounding this case demonstrate that Consolidated should be allowed to recover the state court judgment. The New Mexico Court heard witnesses and

viewed evidence on the same issues that Southern Union now requests the Commission to address. In this limited case, the Commission refuses to second guess the findings by courts of competent jurisdiction. This is a case that has been fully litigated in the state court system and Southern Union was found liable for negligent misrepresentation. Upon reviewing the complete facts and circumstances surrounding this case, the Commission has had several opportunities to assert its jurisdiction over this issue and declined to do so each time.[4]

Moreover, damages for breach of contract are treated differently than those for torts. Gas contract damages represent costs paid for gas, and thus can be recovered in current rates through a pipeline's PGA. By contrast, tort damages do not represent costs paid for gas, and therefore cannot be recovered in current rates. Thus, in this case, these tort damages will be paid by Southern Union's shareholders. Accordingly, the Commission finds that the state court judgment does not violate the NGA or the NGPA.

Southern Union claims that the Commission errs by drawing an artificial distinction between tort and contract action. Southern Union states that the Commission incorrectly perceives a different conduct in tort actions than in contract actions. The Commission agrees that whether an action is for tort or breach of contract is sometimes hard to determine. As the Fifth Circuit has recently observed, "we are well aware that liability in contract and liability in tort are kindred spirits and blend together at their edges. *United Gas Pipe Line Co. v.*

---

[4] The Commission refused in its March 22, 1985 order, 30 FERC ¶ 61,350 (1985), to declare that damages awarded by the court would be construed as exceeding the applicable ceiling price. The Commission noted that it would consider a number of factors including the amount of damages, the basis for the damages, and the relevant facts and circumstances and applicable legal principles. *Id.* at p. 61,710.

FERC, 5th Cir. No. 86-4424 (August 18, 1987). On the other hand, while both tort and contract actions involve conduct there is a distinction between the two types of conduct. In this case, it is not the conduct under the contracts that is at issue, but the conduct surrounding settlement negotiations that prompted Consolidated to dismiss litigation against Southern Union. In an action for breach of contract there would appear to be an irreconcilable conflict between the NGPA and the common-law remedy because the rate paid for the gas would be affected. Here no conflict exists because the damages were paid for tortious conduct and the damage award is thus not considered part of the purchase price. The Commission's decision here is based on and limited to the specific facts of this case. Whether tort damages in future cases may be a violation of the NGA or NGPA necessarily will involve an analysis of the specific facts presented to determine whether the damages are part of the price paid for natural gas.

The Supreme Court has stated that "compliance with the intent of Congress cannot be avoided by mere artful pleading." *Chicago and Northwestern Transportation Company v. Kalo Brick & Tile Co.*, 450 U.S. 311 at 324 (1981) (state tort claims preempted by exclusive federal jurisdiction even though plaintiff's allegations did not contain specific language which would invoke the Interstate Commerce Act). *See also Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971), *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468 (9th Cir. 1984), *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978). However, there is a sharp distinction between this litigation, involving negligent misrepresentation during the negotiation of a settlement, and an action for breach of contract. Furthermore, as stated above, both the Commission and the New Mexico courts reviewed the facts and cir-

cumstances surrounding this case and concluded that the tort action was not so "inextricably intertwined" with the pricing provisions of the NGPA that a finding of preemption was required.

We believe our decision here is distinguished from the underlying principles of *Arkla*, which we interpret as holding that in the absence of affirmative or fraudulent misconduct, breach of contract judgments which would increase the price of jurisdictional natural gas above the rates on file or the applicable maximum lawful price under the NGPA are preempted by the Congressionally mandated federal system of regulation of natural gas prices. In the present case, the judgment was awarded for negligent misconduct. Moreover, as we held above, under the specific facts presented here, the damages awarded do not constitute part of the price of gas. Since *Arkla* concerns a situation in which the damages were essentially "a rate never filed with the Commission . . . ." (450 U.S. at 579), it is not applicable here.

Southern Union concluded its petition by stating that it had "already paid as part of a lump-sum settlement an amount which represents the difference between the proper ceiling rates originally paid and intrastate rates mistakenly attributed to [the] four interstate contracts." (Petition at 17). Southern Union requests the Commission to order Consolidated to refund this payment, which is alleged to be $194,421.63, "subject to audit." In the June 19 order, the Commission found that Southern Union had not supplied adequate information to support its request and the request was denied. Upon further review of this matter, the Commission reaffirms its prior determination.

Based on the foregoing considerations, the Commission holds that the judgment of the New Mexico District Court is not preempted by exclusive federal price regulation of the four disputed contracts and that the amounts awarded can lawfully be collected by Consolidated.

The Commission orders:

(A) The orders issued herein on June 19, 1986, and May 22, 1987, are reaffirmed and clarified in accordance with the terms of this order.

(B) Southern Union's request that Consolidated be required to refund a settlement payment of approximately $194,421 is denied.

APPENDIX C

SUPREME COURT OF NEW MEXICO

No. 16037

CONSOLIDATED OIL & GAS, INC.,
Plaintiff-Appellee,
v.

SOUTHERN UNION COMPANY, GAS COMPANY OF NEW MEXICO AND SOUTHERN UNION GATHERING COMPANY,
Defendants-Appellants.

July 9, 1987

Rehearing Denied Aug. 14, 1987

Certiorari Denied Feb. 22, 1988

Montgomery & Andrews, Victor R. Ortega, Sarah M. Singleton, Santa Fe, Strasburger & Price, Leo J. Hoffman, Bruce E. Henderson, Dallas, Tex., Morrison & Forester Robert M. Leoffler, Washington, D.C., for defendants-appellants.

Campbell & Black, Michael B. Campbell, Bradford C. Berge, Santa Fe, for plaintiff-appellee.

OPINION

SOSA, Senior Justice.

Consolidated Oil and Gas, Inc. (Consolidated) sued Southern Union Company (SUC), Gas Company of New

Mexico (GASCO), and Southern Union Gathering Company (Gathering) for breach of a Settlement Agreement from a prior price litigation. SUC responded with a request for a reformation of the contract in question on the grounds of "mistake," because federal energy regulation rendered the agreement unenforceable as written. Consolidated then amended its complaint, first to allege fraud and subsequently to allege negligent misrepresentation. SUC answered that the relief requested by Consolidated would still conflict with federal price regulation. After Consolidated had abandoned its contract claim, the trial court found no actual fraud, but entered judgment for Consolidated on the claim of negligent misrepresentation.

SUC appeals to this court. We affirm the judgment of the trial court, but remand for recalculation of pre-judgment interest.

The dispute underlying this action involves the intricacies of interstate and intrastate pricing and regulation of natural gas, and the stakes are high. Judgment was for a total of $11,023,967 plus statutory interest. Nevertheless, the primary issue on appeal is simply whether Consolidated reasonably relied on the representations of SUC when it entered into the Settlement Agreement. Put more narrowly, does substantial evidence support the trial court's finding that Consolidated's reliance was justified?

SUC raises three additional issues on appeal:

II. Whether the trial court's decision and damage award are pre-empted by the system of federal regulation of interstate gas sales;

III. Whether the trial court erroneously adopted Consolidated's damage calculations incorporating stripper well prices in excess of those permitted by state law; and

IV. Whether the trial court erred in calculating pre-judgment interest.

FACTS

In 1953, SUC spun off its subsidiary, Gathering, which purchased gas from producers in the San Juan Basin. Gathering commingled the gas and resold some interstate through the pipeline of El Paso Natural Gas Company (El Paso) and some intrastate through a parallel pipeline of another SUC subsidiary, GASCO.[1] Some thirty years ago Consolidated began to sell gas to SUC, for resale in both interstate and intrastate markets.

There are four contracts at issue here, dated August 24, 1956, January 1, 1958, September 6, 1960 and November 26, 1960.[2] The 1958 contract was originally between Consolidated and Gathering; SUC assigned the remaining three to Gathering in 1963. At that time, Gathering was reselling most of the gas interstate to El Paso.

FEDERAL JURISDICTION

The Federal Power Commission (FPC or Commission) and its successor, the Federal Energy Regulatory Commission (FERC or Commission) have exercised close control over pricing and other features of interstate gas sales ever since the Natural Gas Act of 1938 (NGA), 15 U.S.C. § 717.[3] In 1954 the United States Supreme Court upheld the authority of the FPC to regulate sales by independent

---

[1] In 1976 Southern Union Gas Company became Southern Union Company and the subsidiary supplying gas to New Mexico customers was renamed Gas Company of New Mexico. In January 28, 1985 SUC sold GASCO to Public Service Company of New Mexico (PNM). Effective the same date, SUC transferred the stock of Gathering to a subsidiary of PNM.

[2] The last contract was severed in 1963 and one part assigned from SUC to Gathering. The portion retained by SUC continued sales entirely intrastate.

[3] In 1978, Congress passed the Natural Gas Policy Act (NGPA) which continued federal regulation and established prices directly, instead of delegating that function to the FERC. 15 U.S.C. §§ 3313-14.

producers for resale interstate. *See Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035 (1954).

To sell gas interstate, a producer must obtain a certificate of public convenience and necessity from the FPC. 15 U.S.C. § 717(c). Once a certificate is issued, the gas is "committed and dedicated" to the interstate market and therefore subject to the price ceilings established by the FPC. The gas cannot then be removed from federal regulation unless the FPC approves abandonment. Finally, if intrastate and interstate gas become commingled, then all the gas in the commingled stream is deemed committed to interstate commerce and thereby subject to federal price ceilings and regulation. *See California v. Lo-Vaca Gathering Co.*, 379 U.S. 366, 85 S.Ct. 486, 13 L.Ed.2d 357 (1965) (*Lo-Vaca*).

SUC substantially assisted Consolidated in drafting the applications for certification in 1958 and 1963.[4] At that time the interstate market for gas was stronger and more stable than the intrastate market, although prices in both were comparable. Subsequently, Gathering established an entirely separate "nonjurisdictional system," which originally received deliveries from Consolidated and others for resale interstate. The FPC approved this temporary arrangement for a period of three years. After 1973 this system became exempt from federal regulation as the gas in it was directed to GASCO for resale intrastate.

With the onset of the "energy crisis" in the early 1970's, the unregulated intrastate prices started to soar, diverging from interstate prices. As a result, in 1974, a number of SUC's suppliers, including Consolidated, brought suit to enforce the most favored nations clauses in their intrastate contracts. Azetc Oil and Gas (Aztec) was SUC's greatest supplier and leading litigant.

---

[4] In 1972, Consolidated independently applied for and obtained from the Commission a single blanket small producer certificate.

Gathering intervened in the action, claiming that SUC had partially assigned to Gathering its interest in the contract dated November 26, 1960. Yet SUC admitted in its answer to Consolidated's complaint that the contract, "certificated" in 1963, involved only intrastate sales. From this and other evidence it can be concluded that SUC possessed the ability to transfer, unilaterally, intrastate gas into a commingled stream subject to certification in interstate commerce.

Consequently, Consolidated grew concerned to learn the ultimate destination of its gas. If it were never commingled with interstate gas, but rather channeled by Gathering into its intrastate or "nonjurisdictional" lines, then federal price ceilings need not apply. The trial court in this case found, and SUC does not seriously challenge, that only SUC could know into which of its parallel pipelines any particular gas was flowing.

SUC obtained a partial summary judgment in the first suit and its producers appealed. While the appeal was pending, in 1976, SUC and Aztec arrived at a settlement in principle to replace the intrastate contracts with new ones giving increased price terms. At the same time, the settlement included a provision for replacing the interstate contracts, not at issue in the litigation, with more modern ones containing pricing and other terms more favorable to producers.

Evidently SUC intended to effectuate similar settlements with Consolidated and the other producers. Accordingly, SUC began to negotiate with Consolidated. Consolidated made repeated inquiries of SUC to learn whether the gas under the four disputed contracts was in fact flowing in interstate commerce.

SUC prepared a draft agreement dated June 3, 1976, providing higher prices for only the six intrastate contracts in dispute in the producer litigation. The draft set forth the following recital by way of introduction:

> It is recognized that all the gas sold by the Producer under the Contract was resold and consumed solely within the State of New Mexico and therefore such sales by the Producer were not subject to regulation by the Federal Power Commission.

Consolidated rejected this first offer of settlement because it did not include the disputed contracts.

SUC attorneys revised the draft by inserting two provisions: one added the four disputed contracts to the six previously listed; the second increased the lump sum settlement amount for past sales from $544,164.93 to $641,258.12, reflecting the intrastate price differential. Significantly, SUC did not delete or amend the recital that all the gas covered by the contract was intrastate. Dated June 28, 1976, this draft was signed by Oran L. Haseltine, as vice-president of GASCO and Gathering. Relying on SUC's representations, Consolidated signed the second draft, releasing all its litigated claims against SUC. Because GASCO was and is a "public utility" under state law, the Settlement Agreement had to be reviewed and approved by the New Mexico Public Service Commission (PSC). On July 22, 1976, with full public hearing and review, PSC issued its Final Order approving the Settlement Agreement. The Final Order noted that "a strong possibility exist[ed]" that the Supreme Court would rule against GASCO on its appeal of the producer litigation and that therefore stockholders and ratepayers would benefit from a settlement. Furthermore, the Final Order concluded that "[t]he proposed settlement of the producer litigation is fair and reasonable and in the public interest."

Pursuant to the Settlement Agreement and the PSC Final Order, the parties filed a Stipulation of Dismissal in the district court on July 1, 1976. On December 1, 1976, Consolidated demanded payment from SUC of the intrastate price for gas sold under the disputed contracts,

consistent with the Settlement Agreement. SUC refused to pay more than the interstate price, stating that federal law dictated such a result.

Consolidated sued, in November 1979, alleging breach of the Settlement Agreement. SUC raised the defense of mutual mistake, and answered that the agreement should be reformed because the gas sold under the disputed contracts had always been, for federal regulatory purposes, "jurisdictional."

In March 1980, SUC moved the trial court to stay the proceedings while their petition was pending before FERC. Consolidated responded by filing a motion to amend its complaint to add a count for fraud and deceit. On August 4, 1980, the trial court granted Consolidated's motion to amend, denied SUC's motion for stay, and referred to the Commission the questions of primary jurisdiction and applicability of interstate price ceilings. The court reserved to itself the "controlling principles of state law with respect to actions at law for fraudulent and deceitful conduct."

Subsequent to taking depositions of SUC representatives, Consolidated moved again to amend its complaint, in August 1984, to include a count for negligent misrepresentation. The trial court granted the motion, and SUC answered with the affirmative defense that the FERC had determined that interstate price ceilings applied to the commingled gas. Therefore, SUC maintained, to pay the higher prices claimed by Consolidated would be to violate federal law.

After a bench trial, the trial court found that SUC had negligently misrepresented the jurisdictional status of the gas and that Consolidated had released its claims against SUC in reasonable reliance on the misrepresentation. The trial court found that Consolidated was damaged in the amount equal to the difference between the interstate price and the amount SUC should have paid if the repre-

sentations had been true. SUC timely appealed to this Court.

RELATED PROCEEDINGS

A. In March 1980, Gathering petitioned the Commission to assert primary jurisdiction over the suit and to issue a declaratory order that the disputed contracts concerned interstate sales subject to federal price ceilings and that Consolidated should refund the portion of the lump sum payment in excess of the allowable interstate prices. The FERC did not assume primary jurisdiction, but it did ultimately enter an order declaring that the gas sales in question were subject to federal price ceilings under the NGA. 28 FERC Par. 61,225 (1984). On rehearing, the FERC affirmed this order. 30 FERC Par. 61,350 (1985).

Consolidated petitioned for review of the FERC orders to the U.S. Court of Appeals for the District of Columbia Circuit. 806 F.2d 275 (C.A.D.C.1986). The appellate court, citing *Lo-Vaca*, affirmed the Commission, holding that federal jurisdiction attached once the gas in question had become commingled with gas flowing in interstate commerce. It is the fact of commingling, not certification, that confers FERC jurisdiction.

It is by now abundantly clear that commingled gas is subject to price ceilings established by the FERC. Therefore, as a matter of law, parties may not contract for the sale of commingled gas at prices exceeding the FERC ceilings. There is thus no cause of action sounding in contract available to Consolidated to recover the intrastate prices promised in the Settlement Agreement.

B. The Commission itself, however, has consistently declined to entertain this litigation on the merits. After losing in the trial court, SUC petitioned the Commission for a declaratory order that it would violate federal price regulation for Consolidated to collect the damages

awarded by the trial court, especially inasmuch as the amount of damages corresponds exactly to the difference between the interstate price ceiling and the intrastate price for the four disputed contracts. On June 19, 1986, the Commission issued an order declaring that the damages awarded by the state court are tort damages and thus do not violate maximum lawful price provisions of the NGPA, nor interfere with the federal regulatory scheme. 35 FERC Par. 61,359 (1986). The Commission rested its decision on the case of *Gulftide Gas Corporation*, 31 FERC Par. 61,288 (1985) (*Gulftide Gas*), in which "the Commission declared that the award of tort damages, whether exemplary or actual, does not conflict with NGPA maximum lawful prices." 35 FERC at Par. 61,822. Furthermore, the order denied SUC's request for a refund of the allegedly excess lump sum payment. *Id.*

SUC filed a request for rehearing with the Commission on July 21, 1986. In its request, SUC again urged that FERC was the preferred forum for Consolidated's claim. By way of its footnote No. 13, SUC suggested that FERC would have had the authority upon a sufficient showing by Consolidated, to approve the prices provided by the Settlement Agreement. Of course this argument runs contrary to the "bright line" of jurisdictional price controls, behind which SUC had sought refuge from its obligation represented in the Settlement Agreement.

Almost summarily, the Commission rejected the request, finding that SUC had presented no new facts or arguments. The Commission explained that it had determined *Gulftide Gas* to be controlling as precedent, reiterating the principle that the award of damages for misrepresentation in a state law case does not conflict with maximum lawful prices established by the NGA and NGPA.

Finally, in response to SUC's arguments that Consolidated, through "artful pleading," was wilfully mischar-

acterizing its cause of action to avoid federal jurisdiction and that the Commission saw only a "snapshot" of the whole case, the Commission declared that:

> In making that determination, the Commission reviewed Consolidated's state court damage award, including the amount of damages, the basis for the damages, as well as the relevant facts and circumstances and applicable legal principles.

I. JUSTIFIABLE RELIANCE

A. On appeal to this Court, SUC characterizes the entire controversy as the result of a "drafting error" in the Settlement Agreement, contending that Consolidated had sufficient independent knowledge not to be misled by the admittedly negligent representation. At no time, however, has SUC provided, either to the trial court or to this Court, a convincing explanation for why its "mistake" came about, or why it went undetected for so long. Consolidated had rejected the first draft because it did not refer to the disputed contracts. That reference was added and the lump sum augmented unilaterally by attorneys for SUC; the draft was signed by an officer of SUC.

There is evidence in the record that SUC was anxious to settle the producer litigation quickly. It is unquestionable that SUC was in the position of superior knowledge, both of the physical distribution of the gas and of its legal and jurisdictional implications. Conceivably, just as SUC had assisted Consolidated in the original certification, and as it had arranged for Gathering to obtain FPC approval to have one of its pipelines revert to "nonjurisdictional" status, so it might have led Consolidated to believe that similar assistance might be forthcoming to obtain Commission approval to abandon the certification and revert the gas to intrastate sales. The trial court concluded that SUC owed a fiduciary duty to Consolidated to give truthful and accurate information regarding the resale destina-

tion of the gas, and that SUC by words and conduct breached that duty.

Furthermore, although the court did not find that Consolidated had proved fraud by clear and convincing evidence as required by law, it did note that there was some evidence of actual or constructive fraud.

B. Finally, it must be emphasized that the events in question occurred in the context of litigation. This was not a simple transaction wherein SUC agreed to buy and Consolidated agreed to sell certain amounts of gas at certain prices. Such a contract, if in fact mistaken, could be rescinded or reformed. Here, however, the consideration given by Consolidated was the value of its claim in the producer litigation. At this juncture it would be impossible to restore the parties to the *status quo ante*. The Settlement Agreement itself formed but a portion of the overall arrangement approved and authorized by the PSC.

In addition, we observe that SUC has enjoyed for some ten years the use of nearly nine million dollars as a result of its misrepresentations. At some moment an end must be declared to these proceedings. SUC asserts that it would be wrong to award Consolidated a "windfall" for relying on representations which it should have known were impossible as a matter of federal regulation. We agree with the trial court that in light of the legal and factual relationships involved, SUC cannot use Consolidated's inadvertance to excuse or justify its own. Accordingly, the judgment of the trial court on this point is affirmed.

II. PRE-EMPTION

SUC contends to this Court, as did Gathering to the Commission, that the pervasive scheme of federal price regulation pre-empts a state court award of damages, citing *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 101 S.Ct. 2925, 69 L.Ed. 2d 856 (1981) (*Arkla*). In that

case, the Supreme Court struck down the judgment of a state court that awarded contract damages in excess of federally filed rates. The Commission distinguished *Arkla* because it was decided on the basis of the filed rate doctrine, which is inapplicable to the present proceeding.

We agree. Even more important to our analysis, however, is the distinction established by the *Arkla* court itself. The damages awarded by the trial court in *Arkla* constituted simply the contractual price, which was found to exceed the permissible filed rates. The Supreme Court stated that federal regulation would be undermined if state courts could authorize contractual agreements contrary to a congressionally established scheme. There was no finding in *Arkla*, however, of any intentional misconduct by defendants. In the present case, the trial court awarded damages, not as contract prices, but as consequences for tortious conduct. For this reason, too, *Arkla* does not provide precedent for the case at bar. We join with the Commission in following instead the rule of *Gulftide Gas* that tort damages do not conflict with federally regulated pricing. Finally, we conclude from the foregoing that the federal pre-emption argument advanced by SUC has been effectively answered in the appropriate federal forum.

III. STRIPPER WELL CALCULATION

SUC challenges Consolidated's calculation of damages based on production from "stripper" wells, which were at the time subject to independent price regulation under the New Mexico Natural Gas Pricing Act (NMNGPA). *See* Laws 1979, Ch. 97, § 3 and Laws 1977, Ch. 73, § 7 (now repealed). The testimony at trial is in conflict as to the legal effect of the Settlement Agreement on the price to be paid for stripper wells. Consolidated's witness stated that he excluded stripper wells when calculating the price differentials. SUC's witness testified that the NMNGPA would have prevented Consolidated from re-

ceiving the full price for stripper wells in December 1978 and January, February and March 1979. SUC asserts that, as a result, Consolidated overestimated its damages in the amount of $38,415.

Our review of the record does not reveal the clear and obvious error claimed by SUC. Moreover, the nature of the suit and the damages awarded by the trial court are such that our affirmance is based not solely on what prices would have been permissible according to contract, but rather on the values Consolidated thought it would receive when it relied on the representations made by SUC. There is substantial evidence to support all the elements of the trial court's calculation of damages.

IV. CALCULATION OF INTEREST

SUC contends on appeal that the trial court erred in its award of prejudgment interest. The trial court intended to award 6% simple interest, the statutory amount in effect at the time the suit was filed. *See* NMSA 1978, § 56-8-4 (Repl. Pamp. 1986). Consolidated concedes that the trial court incorrectly computed the interest award from a calculation incorporating monthly compounding. The result was an award of interest in excess of the statutory rate, contrary to the holding of this Court in *Shaeffer v. Kelton*, 95 N.M. 182, 188, 619 P.2d 1226, 1232 (1980).

Consolidated replies that the overall damages were, if anything, too low in comparison to actual damages incurred. Because of the long time between filing of the lawsuit and the entry of final judgment, Consolidated claims that it was forced to borrow funds at interest rates well in excess of those computed by the trial court in calculating damages. Consolidated requests this Court to remand the cause to the trial court for an upward revision of the damage award. This we decline to do. The cases Consolidated cites from other jurisdictions do not

convince this Court to overturn our holding in *Shaeffer v. Kelton.*

The judgment of the trial court is affirmed and the cause remanded for the sole purpose of recalculating the amount of prejudgment interest.

IT IS SO ORDERED.

STOWERS and WALTERS, JJ., concur.

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Monday, October 31, 1988

No. 17,697

CONSOLIDATED OIL AND GAS, INC.,
Plaintiff-Appellee,

vs.

SOUTHERN UNION COMPANY, *et al.*,
Defendants-Appellants.

This matter coming on for consideration by the Court upon Motion of Appellants for rehearing and relief from judgment, and the Court having considered said motion and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the Motion of Appellants for rehearing and relief from judgment is hereby denied.

ATTEST: A TRUE COPY

/s/ Rose Marie Aldracte
Clerk of the Supreme Court
of the State of New Mexico

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

MANDATE No. 17,697

THE STATE OF NEW MEXICO TO THE DISTRICT COURT sitting within and for the County of Santa Fe, GREETING:

WHEREAS, in a certain cause lately pending before you, numbered SF 79-2161(C) on your Civil Docket wherein Consolidated Oil & Gas, Inc. was Plaintiff and Southern Union Company, et al were Defendants, by your consideration in that behalf judgment was entered against said Defendants; and

WHEREAS, said cause and judgment were afterwards brought into our Supreme Court for review by said Defendants by appeal, whereupon such proceedings were had that on September 27, 1988, an Opinion was handed down by said Supreme Court and Judgment was entered affirming your judgment aforesaid to accrue postjudgment interest on the prejudgment interest award of $2,177,695 from July 12, 1985 until paid in full, and remanding said cause to you.

NOW, THEREFORE, this matter is hereby remanded to you for such further proceedings therein as may be proper, if any, consistent and in conformity with said Opinion and said Judgment.

WITNESS, The Hon. Tony Scarborough, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 31st day of October, 1988.

(SEAL)

/s/ Rose Marie Aldracte
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX E

IN THE DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

No. 87 79-2161 (c)

CONSOLIDATED OIL & GAS, INC.,
Plaintiff,

vs.

SOUTHERN UNION COMPANY, GAS COMPANY OF NEW MEXICO, and SOUTHERN UNION GATHERING COMPANY,
Defendants.

ORDER

[Filed Aug. 5, 1980]

This matter having come before the Court upon Plaintiff's Motion to Amend Complaint and also upon Defendants' Motion to Stay Proceedings on grounds that the issues presented by Plaintiff's Complaint are within the primary jurisdiction of the Federal Energy Regulatory Commission (FERC) and on further grounds that Defendant Southern Union Gathering Company has, subsequent to the filing of the Complaint herein, filed a Petition with FERC (Docket No. CI 80-264) requesting such agency to assert primary jurisdiction over certain matters relevant hereto, and the Court having considered the briefs and oral arguments of the parties:

It is hereby ordered and adjudged and decreed that:

1. Plaintiff's Motion to Amend Complaint is hereby granted.

2. Defendants' Motion to Stay Proceedings is hereby denied, except with respect to the following issues:

(a) Whether all or any portion of natural gas sold by Consolidated to Defendants pursuant to four (4) natural gas purchase contracts dated August 24, 1956, January 1, 1958, September 6, 1960 and November 26, 1960, as amended, is subject to the jurisdiction of FERC pursuant to the Natural Gas Act, the Natural Gas Policy Act, or rules and regulations promulgated in accordance therewith;

(b) In the event that all or any portion of such natural gas is subject to FERC jurisdiction, the applicable prices payable by Defendants to Consolidated under the referenced statutes and regulations, absent controlling principles of state law with respect to actions at law for fraudulent and deceitful conduct;

which issues are herein referred to FERC for examination and determination on the basis of primary jurisdiction, and the parties are stayed from discovery on such issues.

3. In the event FERC does not accept primary jurisdiction to examine the issues referenced in Paragraphs 1(a) and 1(b) within sixty (60) days of the date this Order is entered, the stay of discovery will lapse and the parties may proceed with discovery on such issues.

4. Plaintiff's discovery concerning all other issues in this cause, specifically Plaintiff's claim with respect to fraudulent conduct contained in Paragraphs 49 through 58 of the Amended Complaint, may proceed forthwith.

DATED: 8-4-80.

/s/ Karl Byrd
KARL BYRD
District Judge

APPENDIX F

FIRST JUDICIAL DISTRICT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

No. SF 79-2161 (C)

CONSOLIDATED OIL & GAS, INC.,
Plaintiff,

vs.

SOUTHERN UNION COMPANY, GAS COMPANY OF NEW MEXICO, and SOUTHERN UNION GATHERING COMPANY,
Defendants.

DECISION OF THE COURT

[Filed July 12, 1985]

THIS MATTER came before the court for trial to the bench on the merits on April 1, 1985. Plaintiff appeared by counsel, Michael Campbell and Bradford Berge; Defendants appeared by Victor Otega, Leo J. Hoffman and Bruce E. Henderson. At that time, evidence was taken and arguments heard by the court after which the court determined the matter in favor of the Plaintiffs and awarded appropriate damages. The court's Decision is based upon the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Consolidated Oil & Gas, Inc. (CONSOLIDATED) is a Colorado corporation authorized to do business in New Mexico.

2. Southern Union Company is a Delaware corporation authorized to do business in New Mexico; Gas Company of New Mexico was, at all material times, a division of the Southern Union Company; Southern Union Gathering Company was, at all material times, a Delaware corporation, a wholly-owned subsidiary of the Southern Union Company, and authorized to do business in New Mexico. (SOUTHERN UNION)

3. At all material times, the defendants acted jointly for and on behalf of one another.

4. SOUTHERN UNION buys gas at the wellhead from suppliers in the San Juan Basin, including CONSOLIDATED; SOUTHERN UNION resells the gas both solely within New Mexico and outside the state in interstate commerce.

5. Before 1974, CONSOLIDATED and SOUTHERN UNION had entered into various contracts for the sale and purchase of gas at a time when federal regulation of the oil and gas industry was minimal.

6. These contracts included the August 24, 1956 Contract, the January 1, 1958 Contract, the September 26, 1960 Contract and the November 26, 1960 Contract, collectively called the Disputed Contracts.

7. In the mid-60's, federal regulation created a market environment which made it beneficial for gas suppliers, like CONSOLIDATED, to allow SOUTHERN UNION to determine whether gas would be sold within the state and outside the state in order that all suppliers could guaranteed a fair share of the market.

8. In order to participate, CONSOLIDATED was obliged to apply to the federal regulatory agency, then the Federal Power Commission, to authorize the sale of gas to SOUTHERN UNION in interstate commerce for resale.

9. The application was granted by the FPC and CONSOLIDATED was issued a Certificate of Public Convenience and Necessity, relating to the four Disputed Contracts.

10. At the time, CONSOLIDATED had no legal staff and was assisted in the drafting of the application, its filing and in the pursuit before the Commission of the Certificate of Public Convenience and Necessity by attorneys employed by SOUTHERN UNION.

11. SOUTHERN UNION was, in comparison to CONSOLIDATED, a very large company, sophisticated in the field and possessed of a sizeable and experienced legal staff.

12. SOUTHERN UNION ran two parallel underground pipelines in the San Juan Basin, one of which transported gas for resale solely within the State of New Mexico, the second of which transported gas for resale partly within the State of New Mexico in intrastate commerce and partly outside the State of New Mexico in interstate commerce.

13. SOUTHERN UNION possessed the sole ability to determine the pipeline through which gas produced from any particular well subject to the Disputed Contracts would be transported and, by that determination, whether gas from that well would flow in interstate or intrastate commerce.

14. SOUTHERN UNION possessed the ability to easily and unilaterally switch a producer's well from one pipeline to the other.

15. Only SOUTHERN UNION possessed the knowledge of the resale destination of the gas covered by the Disputed Contracts and flowing in its pipelines.

16. CONSOLIDATED had no independent knowledge of the resale destination of the gas it sold to SOUTHERN

UNION and could only know by asking SOUTHERN UNION for those facts.

17. In the late 60's and early 70's, the market began to favor intrastate sales because interstate sales were so heavily regulated by the federal government; prices for intrastate gas began to rise substantially beyond those offered for interstate gas.

18. The Disputed Contracts each contained a "favored nations" or price escalation clauses which generally required that SOUTHERN UNION buy gas from CONSOLIDATED at the highest prices paid to any producer in the Basin.

19. In light of increasing federal regulation of natural gas prices, it became increasingly important to determine the resale destination of the gas so as to secure the best possible price.

20. In September 1974, CONSOLIDATED and a number of other producers sued SOUTHERN UNION alleging a breach of the "favored nations" clauses in those contracts for gas sold in intrastate commerce but did not include the Disputed Contracts as they were controlled by the FPC.

21. SOUTHERN UNION prevailed in the District Court and the suit moved into the appellate forum where it was the best judgment of the lawyers involved that the District Court's decision would likely be reversed.

22. SOUTHERN UNION began negotiating settlement agreements with the producers, including CONSOLIDATED.

23. SOUTHERN UNION's goal was to settle all claims and by a date certain in order to gain certain economic or tax advantages.

24. In the course of negotiations, CONSOLIDATED began to focus on the resale destination of its gas, the

means by which SOUTHERN UNION could affect sales in interstate or intrastate and ways to avoid federal regulation of its sales.

24. To the end, CONSOLIDATED specifically questioned SOUTHERN UNION on where its gas was being sold pursuant to its various contracts; SOUTHERN UNION was unwilling or unable to say.

25. In the proposed settlement agreement between CONSOLIDATED and SOUTHERN UNION, 10 contracts were included; some of the Disputed Contracts were among those included in the agreement.

26. The proposed agreement was prepared in draft by lawyers employed by SOUTHERN UNION.

27. The settlement agreement contained a recital which stated that it was recognized by the parties that all of the gas being sold by CONSOLIDATED under the contracts in the settlement agreement, including one of the Disputed Contracts, was resold and consumed solely within the state of New Mexico and therefore such sales were not subject to FPC regulation.

28. The agreement was not satisfactory to CONSOLIDATED because it did not include all of the Disputed Contracts and the agreement was returned to SOUTHERN UNION with a request to include them; no other significant changes were sought.

28. SOUTHERN UNION lawyers prepared a second settlement agreement which now included all of the Disputed Contracts and which included the recital referred to in Finding No. 27.

30. CONSOLIDATED signed the agreement and, relying upon it, abandoned its appeal, dismissed its case and released its claims against SOUTHERN UNION.

31. SOUTHERN UNION's representation in the settlement agreement that the gas covered by the Disputed Con-

tracts was resold and consumed solely within the State of New Mexico and, therefore, not subject to FPC regulation was not true.

32. SOUTHERN UNION knew or should have known it was not true and its principal lawyer conceded that it was careless on the part of SOUTHERN UNION to include the Disputed Contracts in the agreement.

33. SOUTHERN UNION never intended to treat the gas purchased from CONSOLIDATED as "intrastate" gas and always intended to treat it as "interstate" gas.

34. Sometime after the signing of the agreement, SOUTHERN UNION informed CONSOLIDATED that it had mistakenly included the Disputed Contracts in the agreement and that it intended to tender "interstate" prices for the gas it was to purchase under those Disputed Contracts, notwithstanding the settlement agreement.

35. Based upon the claim of "mistaken inclusion," SOUTHERN UNION tendered to CONSOLIDATED purchase prices based upon "interstate" gas; CONSOLIDATED accepted the tender but specifically did not waive its right to claim "intrastate" prices in accordance with the settlement agreement.

36. In addition to the other agreements, SOUTHERN UNION had agreed to pay a lump sum settlement to CONSOLIDATED which was, in part, predicated on the "intrastate" nature of the gas in the Disputed Contracts; at, or shortly after the signing of the agreement, SOUTHERN UNION paid the sum to CONSOLIDATED.

37. By reason of the misrepresentation and CONSOLIDATED's reasonable reliance thereon, CONSOLIDATED suffered monetary damages which are ascertainable with certainty, are specific and are not speculative in nature.

38. CONSOLIDATED has suffered the loss of $8,427,978, which is the amount equal to the difference between what it was paid by SOUTHERN UNION under

the settlement agreement and the amount it would have been paid had the representations of SOUTHERN UNION been true.

39. The delay in prosecution of this litigation is largely due to the efforts of SOUTHERN UNION to assert or secure federal jurisdiction over the subject matter so as to remove it from the jurisdiction of this court.

CONCLUSIONS OF LAW

1. The court has jurisdiction over the parties and the subject of this litigation, with respect to the construction of the settlement agreement and the common law tort claims.

2. Under the facts of this case, SOUTHERN UNION owed a duty to CONSOLIDATED to truthful and accurate information concerning the resale destination of gas covered by the Disputed Contracts.

3. SOUTHERN UNION, by their words and conduct, represented to CONSOLIDATED that "all of the gas" under the Disputed Contracts "was resold and consumed solely within New Mexico."

4. That representation was not true.

5. CONSOLIDATED was justified and entitled to rely on the representation of SOUTHERN UNION and did, in fact, rely upon that representation.

6. By signing the settlement agreement, dismissing its lawsuit against SOUTHERN UNION and releasing its claims against SOUTHERN UNION, CONSOLIDATED relied to its detriment on the untrue representation of SOUTHERN UNION.

7. In making the untrue representation, SOUTHERN UNION failed to exercise reasonable care and competence in obtaining and communicating accurate information well within their knowledge and were negligent in making the untrue representation.

8. As a direct and proximate cause of the conduct of SOUTHERN UNION, CONSOLIDATED has been damaged in the amount of $8,427,978.

9. In the court's discretion, CONSOLIDATED is entitled to pre-judgment interest on such sum in the amount of $2,595,989, which is calculated at 6% simple interest, the rate prevailing at the time the lawsuit was brought.

10. SOUTHERN UNION did not prove their affirmative defenses or their counterclaim and, on the same grounds as it has found in favor of CONSOLIDATED, it finds against SOUTHERN UNION on the counterclaim.

11. Any proposed Findings and Conclusions which are inconsistent with the foregoing are herewith specifically rejected.

/s/ Art Encinias
ART ENCINIAS
District Judge

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-1232

SOUTHERN UNION COMPANY,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

CONSOLIDATED OIL AND GAS, INC.,
Intervenor

Petition for Review of an Order of the
Federal Energy Regulatory Commission

Before: ROBINSON, RUTH B. GINSBURG and SENTELLE,
Circuit Judges

JUDGMENT

This cause came on to be heard on the petition for review of an order of the Federal Energy Regulatory Commission and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the petition for review is granted, in accordance with the Opinion of the Court filed herein this date.

Per Curiam
FOR THE COURT:

/s/ Constance L. Dupre
CONSTANCE L. DUPRE
Clerk

Date: September 23, 1988

Opinion for the Court filed by Circuit Judge Sentelle.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-1232

SOUTHERN UNION COMPANY,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

CONSOLIDATED OIL AND GAS, INC.,
Intervenor

Before: RUTH B. GINSBURG and SENTELLE, Circuit Judges, and ROBINSON, Senior Circuit Judge

ORDER

[Filed Sep. 12, 1989]

Upon consideration of Intervenor's petition for rehearing and of the responses thereto it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-1232

SOUTHERN UNION COMPANY,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

CONSOLIDATED OIL AND GAS, INC.,
Intervenor

Before: WALD, Chief Judge; MIKVA, EDWARDS, RUTH B. GINSBURG, SILBERMAN, BUCKLEY, WILLIAMS, D. H. GINSBURG and SENTELLE, Circuit Judges, and ROBINSON, Senior Circuit Judge

ORDER

[Filed Sep. 12, 1989]

Intervenor's suggestion for rehearing *en banc* and the responses thereto have been circulated to the full Court. The taking of a vote was requested. Thereafter, a majority of the judges of the Court in regular, active service did not vote in favor of the suggestion. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Chief Judge Wald and Circuit Judges Buckley and Williams would grant the suggestion. A statement of Circuit Judge Williams, concurred in by Chief Judge Wald and Circuit Judge Buckley, is attached.

Circuit Judge Silberman did not participate in this matter.

APPENDIX J

September 6, 1989

Williams, *Circuit Judge*, with whom Wald, *Chief Judge*, and Buckley, *Circuit Judge*, concur, dissenting from denial of the suggestion for rehearing *en banc*. If the New Mexico court had jurisdiction over application of the filed rate doctrine to the contract, its decision would preclude a second resolution of that issue, by the Federal Energy Regulatory Commission or this court. There is no doubt that the federal filed rate doctrine *preempts* state law. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981). But, contrary to the apparent assumption of the panel, Slip Op. at 6-7, it does not automatically follow that federal jurisdiction over the issue is *exclusive*. We are to presume that state courts have concurrent jurisdiction over issues of federal law, "absent provision by Congress ~~to the~~ contrary or disabling incompatibility between the federal claim and state-court adjudication." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981) (citing *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507-08 (1962); *Claflin v. Houseman*, 93 U.S. 130, 136 (1876)). Indeed, in *Arkla* itself the Supreme Court used its certiorari jurisdiction to correct the state court error; it by no means suggested that the state court lacked power to decide the issue. I would grant rehearing *en banc* to determine whether anything about the filed rate doctrine requires exclusive jurisdiction.

APPENDIX K

Excerpts from the Natural Gas Act, 15 U.S.C. § 717, 717a, c, d, f, i & t

Section 1, 15 U.S.C. § 717:

REGULATION OF NATURAL GAS COMPANIES

(a) NECESSITY OF REGULATION IN PUBLIC INTEREST.—As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) TRANSACTIONS TO WHICH PROVISIONS OF CHAPTER APPLICABLE.—The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) INTRA-STATE TRANSACTIONS EXEMPT FROM PROVISIONS OF CHAPTER; CERTIFICATION FROM STATE COMMISSION AS CONCLUSIVE EVIDENCE.—The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all

the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

Section 2, 15 U.S.C. § 717a:

DEFINITIONS

When used in this chapter, unless the context otherwise requires—

(1) "Person" includes an individual or a corporation.

(2) "Corporation" includes any corporation, joint stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, receiver or receivers, trustee or trustees of any of the foregoing, but shall not include municipalities as hereinafter defined.

(3) "Municipality" means a city, county, or other political subdivision or agency of a State.

(4) "State" means a State admitted to the Union, the District of Columbia, and any organized Territories of the United States.

(5) "Natural gas" means either natural gas unmixed, or any mixture of natural and artificial gas.

(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

(7) "Interstate commerce" means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

(8) "State commission" means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the State or municipality.

(9) "Commission" and "Commissioner means the Federal Power Commission, and a member thereof, respectively.

Section 4, 15 U.S.C. § 717c:

RATES AND CHARGES

(a) JUST AND REASONABLE RATES AND CHARGES.—All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) UNDUE PREFERENCES AND UNREASONABLE RATES AND CHARGES PROHIBITED.—No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue preju-

dice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) FILING OF RATES AND CHARGES WITH COMMISSION; PUBLIC INSPECTION OF SCHEDULES.—Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) CHANGES IN RATES AND CHARGES; NOTICE TO COMMISSION.—Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) AUTHORITY OF COMMISSION TO HOLD HEARINGS CONCERNING NEW SCHEDULE OF RATES.—Whenever any such new schedule is filed the Commission shall have au-

thority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rule or charge is just and reasonable shall be upon the natural-gas com-

pany, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Section 5, 15 U.S.C. § 717d:

FIXING RATES AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

(a) DECREASES IN RATES.—Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) COSTS OF PRODUCTION AND TRANSPORTATION.—The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production

or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

Section 7, 15 U.S.C. § 717f:

CONSTRUCTION, EXTENSION, OR ABANDONMENT OF FACILITIES

* * * *

(b) ABANDONMENT OF FACILITIES OR SERVICES; APPROVAL OF COMMISSION.—No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.—

(1) (A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the

jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

(d) APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.—Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) GRANTING OF CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.—Except in the cases governed by the provisos contained in subsection (c) (1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) (1) DETERMINATION OF SERVICE AREA.—The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization.

(f) (2) If the Commission has determined a service area pursuant to this subsection, transportation to ultimate consumers in such service area by the holder of such service area determination, even if across State lines, shall be subject to the exclusive jurisdiction of the State commission in the State in which the gas is consumed. This section shall not apply to the transportation of natural gas to another natural gas company.

(g) CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR SERVICE OF AREA ALREADY BEING SERVED.—Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) RIGHT OF EMINENT DOMAIN FOR CONSTRUCTION OF PIPELINES, ETC.—When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessity right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

Section 10, 15 U.S.C. § 717i:

PERIODIC AND SPECIAL REPORTS

(a) FORM AND CONTENTS OF REPORTS.—Every natural-gas company shall file with the Commission such annual and other periodic or special reports as the Commission may by rules and regulations or order prescribe as necessary or appropriate to assist the Commission in the proper administration of this chapter. The Commission may prescribe the manner and form in which such reports shall be made, and require from such natural-gas companies specific answers to all questions upon which the Commission may need information. The Commission may require that such reports shall include, among other things, full information as to assets and liabilities, capitalization, investment and reduction thereof, gross receipts, interest due and paid, depreciation, amortization, and other reserves, cost of facilities, cost of maintenance and operation of facilities for the production, transportation, or sale of natural gas, cost of renewal and replacement of such facilities, transportation, delivery, use, and sale of natural gas. The Commission may require any such natural-gas company to make adequate provision for currently determining such costs and other facts. Such reports shall be made under oath unless the Commission otherwise specifies.

(b) UNLAWFUL CONDUCT.—It shall be unlawful for any natural-gas company willfully to hinder, delay, or obstruct the making, filing, or keeping of any information, document, report, memorandum, record, or account required to be made, filed, or kept under this chapter or any rule, regulation, or order thereunder.

Section 21, 15 U.S.C. § 717t:

GENERAL PENALTIES

(a) Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both.

(b) Any person who willfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this chapter, shall, in addition to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $500 for each and every day during which such offense occurs.

APPENDIX L

Excerpts From the Natural Gas Policy Act, 15 U.S.C. §§ 3313-14, 3414 & 3432

Section 103, 15 U.S.C. § 3313:

CEILING PRICE FOR NEW, ONSHORE PRODUCTION WELLS

(a) APPLICATION.—In the case of natural gas determined in accordance with section 3413 of this title to be produced from any new, onshore production well, the maximum lawful price computed under subsection (b) of this section shall apply to any first sale of such natural gas delivered during any month.

(b) MAXIMUM LAWFUL PRICE.—

(1) GENERAL RULE.—The maximum lawful price under this section for any month shall be—

(A) $1.75 per million Btu's, in the case of April 1977; and

(B) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this paragraph for the preceding month multiplied by the monthly equivalent of the annual inflation adjustment factor applicable for such month.

(2) PRODUCTION AFTER 1984 FROM WELLS 5,000 FEET OR LESS IN DEPTH.—Effective beginning with the month of January 1985 and in any month thereafter, in the case of any first sale of natural gas which was not committed or dedicated to interstate commerce on April 20, 1977, and which is produced from a new, onshore production well from a completion location located at a depth of 5,000 feet or less, the maximum lawful price under this section for any

such natural gas delivered during any month shall be a price which is midway between—

(A) the maximum lawful price, per million Btu's, computed for such month under section 3312 of this title (relating to new natural gas); and

(B) the maximum lawful price, per million Btu's, computed for such month under paragraph (1).

(c) DEFINITION OF NEW, ONSHORE PRODUCTION WELL.—For purposes of this section, the term "new, onshore production well" means any new well (other than a well located on the Outer Continental Shelf)—

(1) the surface drilling of which began on or after February 19, 1977;

(2) which satisfies applicable Federal or State well-spacing requirements, if any; and

(3) which is not within a proration unit—

(A) which was in existence at the time the surface drilling of such well began;

(B) which was applicable to the reservoir from which such natural gas is produced; and

(C) which applied to a well (i) which produced natural gas in commercial quantities or (ii) the surface drilling of which was begun before February 19, 1977, and which was thereafter capable of producing natural gas in commercial quantities.

(d) EXCLUSION OF CERTAIN ALASKA NATURAL GAS.—The preceding provisions of this section shall not apply to any natural gas produced from the Prudhoe Bay Unit of Alaska and transported through the natural gas transportation system approved under the Alaska Natural Gas Transportation Act of 1976 [15 U.S.C. 719 et seq.].

Section 104, 15 U.S.C. § 3314:

CEILING PRICE FOR SALES OF NATURAL GAS DEDICATED TO INTERSTATE COMMERCE

(a) APPLICATION.—In the case of natural gas committed or dedicated to interstate commerce on November 8, 1978, and for which a just and reasonable rate under the Natural Gas Act [15 U.S.C. 717 et seq.] was in effect on such date for the first sale of such natural gas, the maximum lawful price computed under subsection (b) of this section shall apply to any first sale of such natural gas delivered during any month.

(b) MAXIMUM LAWFUL PRICE.—

(1) GENERAL RULE.—The maximum lawful price under this section for any month shall be the higher of—

(A) (i) the just and reasonable rate, per million Btu's, established by the Commission which was (or would have been) applicable to the first sale of such natural gas on April 20, 1977, in the case of April 1977; and

(ii) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this subparagraph for the preceding month multiplied by the monthly equivalent of the annual inflation adjustment factor applicable for such month, or

(B) any just and reasonable rate which was established by the Commission after April 27, 1977, and before November 9, 1978, and which is applicable to such natural gas.

(2) CEILING PRICES MAY BE INCREASED IF JUST AND REASONABLE.—The Commission may, by rule or order, prescribe a maximum lawful ceiling price, applicable to any first sale of any natural gas (or cate-

gory thereof, as determined by the Commission) otherwise subject to the preceding provisions of this section, if such price is—

(A) higher than the maximum lawful price which would otherwise be applicable under such provisions; and

(B) just and reasonable within the meaning of the Natural Gas Act [15 U.S.C. 717 et seq.].

Section 504, 15 U.S.C. § 3414:

ENFORCEMENT

(a) GENERAL RULE.—It shall be unlawful for any person—

(1) to sell natural gas at a first sale price in excess of any applicable maximum lawful price under this chapter; or

(2) to otherwise violate any provision of this chapter or any rule or order under this chapter.

(b) CIVIL ENFORCEMENT.—

(1) IN GENERAL.—Except as provided in paragraphs (2) and (3), whenever it appears to the Commission that any person is engaged or about to engage in any act or practice which constitutes or will constitute a violation of any provision of this chapter, or of any rule or order thereunder, the Commission may bring an action in the District Court of the United States for the District of Columbia or any other appropriate district court of the United States to enjoin such act or practice and to enforce compliance with this chapter, or any rule or order thereunder.

* * * *

(4) RELIEF AVAILABLE.—In any action under paragraph (1), (2), or (3), the court shall, upon a proper showing, issue a temporary restraining order or preliminary or permanent injunction without bond. In any such action, the court may also issue a mandatory injunction commanding any person to comply with any applicable provision of law, rule, or order, or ordering such other legal or equitable relief as the court determines appropriate, including refund or restitution.

(5) CRIMINAL REFERRAL.—The Commission may transmit such evidence as may be available concerning any acts or practices constituting any possible violations of the Federal antitrust laws to the Attorney General who may institute appropriate criminal proceedings.

(6) CIVIL PENALTIES.—

(A) IN GENERAL.—Any person who knowingly violates any provision of this chapter, or any provision of any rule or order under this chapter, shall be subject to—

(i) except as provided in clause (ii) a civil penalty, which the Commission may assess, of not more than $5,000 for any one violation; and

(ii) a civil penalty, which the President may assess, of not more than $25,000, in the case of any violation of an order under section 3362 of this title or an order or supplemental order under section 3363 of this title.

(B) DEFINITION OF KNOWING.—For purposes of subparagraph (A), the term "knowing" means the having of—

(i) actual knowledge; or

(ii) the constructive knowledge deemed to be possessed by a reasonable individual who acts under similar circumstances.

(C) EACH DAY SEPARATE VIOLATION.—For purposes of this paragraph, in the case of a continuing violation, each day of violation shall constitute a separate violation.

(D) STATUTE OF LIMITATION.—No person shall be subject to any civil penalty under this paragraph with respect to any violation occurring more than 3 years before the date on which such person is provided notice of the proposed penalty under subparagraph (E). The preceding sentence shall not apply in any case in which an untrue statement of material fact was made to the Commission or a State or Federal agency by, or acquiesced to by, the violator with respect to the acts or omissions constituting such violation, or if there was omitted a material fact necessary in order to make any statement made by, or acquiesced to by, the violator with respect to such acts or omissions not misleading in light of circumstances under such statement was made.

(E) ASSESSED BY COMMISSION.—Before assessing any civil penalty under this paragraph, the Commission shall provide to such person notice of the proposed penalty. Following receipt of notice of the proposed penalty by such person, the Commission shall, by order, asssess[2] such penalty.

(F) JUDICIAL REVIEW.—If the civil penalty has not been paid within 60 calendar days after the assessment order has been made under sub-

---

[2] So in original. Probably should be "assess."

paragraph (E), the Commission shall institute an action in the appropriate district court of the United States for an order affirming the assessment of the civil penalty. The court shall have authority to review de novo the law and the facts involved, and shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part, such assessment.

(c) CRIMINAL PENALTIES.—

(1) VIOLATIONS OF CHAPTER.—Except in the case of violations covered under paragraph (3), any person who knowingly and willfully violates any provision of this chapter shall be subject to—

(A) a fine of not more than $5,000; or

(B) imprisonment for not more than two years; or

(C) both such fine and such imprisonment.

(2) VIOLATION OF RULES OR ORDERS GENERALLY.—Except in the case of violations covered under paragraph (3), any person who knowingly and willfully violates any rule or order under this chapter (other than an order of the Commission assessing a civil penalty under subsection (b)(4)(E) of this section), shall be subject to a fine of not more than $500 for each violation.

(3) VIOLATIONS OF EMERGENCY ORDERS.—Any person who knowingly and willfully violates an order under section 3362 of this title or an order or supplemental order under section 3363 of this title shall be fined not more than $50,000 for each violation.

(4) EACH DAY SEPARATE VIOLATION.—For purposes of this subsection, each day of violation shall constitute a separate violation.

(5) DEFINITION OF KNOWINGLY.—For purposes of this subsection, the term "knowingly", when used with respect to any act or omission by any person, means such person—

(A) had actual knowledge; or

(B) had constructive knowledge deemed to be possessed by a reasonable individual who acts under similar circumstances.

Section 602, 15 U.S.C. § 3432:

EFFECT ON STATE LAWS

(a) AUTHORITY TO PRESCRIBE LOWER MAXIMUM LAWFUL PRICES.—Nothing in this chapter shall affect the authority of any State to establish or enforce any maximum lawful price for the first sale of natural gas produced in such State which does not exceed the applicable maximum lawful price, if any, under subchapter I of this chapter.

* * * *

Supreme Court, U.S.
FILED
JAN 18 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-911

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CONSOLIDATED OIL & GAS, INC.,
Petitioner,

v.

SOUTHERN UNION COMPANY
and
FEDERAL ENERGY REGULATORY COMMISSION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT SOUTHERN UNION COMPANY

Of Counsel:

BRUCE E. HENDERSON
SOUTHERN UNION COMPANY
Austin, Texas

ROBERT H. LOEFFLER*
W. STEPHEN SMITH
LESLIE J. CLOUTIER
MORRISON & FOERSTER
2000 Pennsylvania Avenue, N.W.
Suite 5500
Washington, D.C. 20006
(202) 887-1500

Attorneys for Respondent Southern Union Company

* *Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	2
A. Factual Background	2
1. The Four Interstate Gas Purchase Contracts	2
2. The 1976 Settlement Agreement	4
B. The New Mexico Litigation and the August 1984 FERC Declaratory Order	5
C. The June 1986 FERC Declaratory Order	8
D. The New Mexico Supreme Court Decision	9
E. The D.C. Circuit Decision	9
F. Consolidated's Bankruptcy and Related Proceedings	12
REASONS FOR DENYING THE WRIT	14
I. THE RULING BELOW WAS CLEARLY CORRECT	15
II. REVIEW OF THE RULING BELOW IS NOT NECESSARY TO RESOLVE THE PARTIES' DISPUTE OR TO PROVIDE GUIDANCE TO THE LOWER COURTS	29
CONCLUSION	30
APPENDIX	1a

TABLE OF AUTHORITIES

CASES	Page
A.L.T. Corp. v. Small Business Administration, 801 F.2d 1451 (5th Cir. 1986)	23,24
Allen v. McCurry, 449 U.S. 90 (1980)	23
Andrea Theatres, Inc. v. Theatre Confections, Inc., 787 F.2d 59 (2d Cir. 1986)	24-25
Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981)	*passim*
Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981)	18
Consolidated Oil & Gas, Inc. v. FERC, 806 F.2d 275 (D.C. Cir. 1986)	4
Cullen v. Margiotta, 811 F.2d 698 (2d Cir.), *cert. denied*, 483 U.S. 1021 (1987)	23
England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964)	21,25
Eichman v. Fotomat Corp., 759 F.2d 1434 (9th Cir. 1985)	23,24
Fritz v. FERC, 876 F.2d 1224 (5th Cir.), *cert. denied*, 110 S. Ct. 232 (1989)	16,17,25
Louisiana Land & Exploration Co. v. Amoco Production Co., 878 F.2d 852 (5th Cir. 1989)	17,20
Lyons v. Westinghouse Electric Corp., 222 F.2d 184 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955)	26
Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985)	23,24
Matsu v. Chavez, 96 N.M. 775, 635 P.2d 584 (1981)	24
Mississippi Power & Light v. Mississippi, 108 S. Ct. 2428 (1988)	18,23
Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983)	15-16

Table of Authorities Continued

	Page
Nanavati v. Burdette Tomlin Memorial Hospital, 857 F.2d 96 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1528 (1989)	23
National Association of Regulatory Utility Comm'rs v. FERC, 823 F.2d 1377 (10th Cir. 1987)	20
Pan American Petroleum Corp. v. Superior Court of Delaware, 366 U.S. 656 (1961)	23-24
Public Service Commission v. FERC, 642 F.2d 1335 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 879 (1981)	16
Schneidewind v. ANR Pipeline Co., 108 S. Ct. 1145 (1988)	17
STATUTES	
Administrative Procedure Act	
5 U.S.C. § 706(2)(A)	15
Natural Gas Act	
15 U.S.C. § 717c	8
15 U.S.C. § 717o	8
15 U.S.C. § 717r(b)	25
15 U.S.C. § 717u	17
Natural Gas Policy Act of 1978	
15 U.S.C. § 3313-14	8
15 U.S.C. § 3414	17
15 U.S.C. § 3416(a)(4)	25
OTHER AUTHORITIES	
13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 3536 (1984)	20
Restatement (Second) of Judgments, §§ 11, 12(2), 28(3) & Comment E, 86	24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-911

CONSOLIDATED OIL & GAS, INC.,
Petitioner,

v.

SOUTHERN UNION COMPANY

and

FEDERAL ENERGY REGULATORY COMMISSION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT SOUTHERN UNION COMPANY

Respondent Southern Union Company ("Southern Union")[1] respectfully requests that this Court deny the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit filed by Consolidated Oil & Gas, Inc. ("Consolidated").

---

[1] Pursuant to Rule 28.1 of this Court, Southern Union Company has no partially-owned subsidiaries or affiliates.

STATEMENT OF THE CASE

This case involves two parallel proceedings: (1) a common-law action initiated by Consolidated in New Mexico state court in 1979 concerning Southern Union's obligations under state law with respect to four interstate gas purchase contracts, and (2) a declaratory order proceeding initiated by Southern Union with Respondent Federal Energy Regulatory Commission ("FERC" or "Commission") in 1980 concerning Consolidated's obligations under federal law with respect to the same four contracts.

A. Factual Background

1. The Four Interstate Gas Purchase Contracts

Southern Union is an integrated natural gas company with its headquarters in Austin, Texas. Consolidated is a producer of natural gas that has operated in sixteen states, including New Mexico, and two foreign countries. For a period of more than twenty years prior to the initiation of the New Mexico state court proceeding in 1979, Southern Union purchased natural gas from Consolidated and other producers in the San Juan Basin of New Mexico for resale in both interstate and intrastate commerce.

The four interstate gas purchase contracts at issue in the New Mexico litigation were executed by Southern Union and Consolidated during the period 1956 through 1960.[2] At the time the contracts were entered, Southern Union owned and operated a natural gas gathering system, through which it made sales to both an intrastate gas distribution utility and an interstate gas pipeline. As required by federal regulation, Consolidated applied for and obtained from the Federal Power Commission ("FPC") the

---

[2] The parties to those contracts were Consolidated and Southern Union Gathering Company, a subsidiary of Southern Union. For convenience, we refer to all of Southern Union's corporate predecessors and subsidiaries as "Southern Union."

necessary federal certificates of public convenience and necessity to make interstate sales under each of the four contracts.[3]

In 1972, Consolidated applied for and obtained a blanket small producer certificate to replace its individual sales certificates, including those covering the four contracts with Southern Union. As under the original certificates of public convenience and necessity, Consolidated was restricted under the terms of the small producer certificate to making sales at no more than the federal ceiling price applicable to its gas. Pet. App. 16a, 19a.

Gas from each of the four contracts flowed under these arrangements and substantial volumes of the gas were resold in interstate commerce.[4] Pet. App. 16a, 28a. As the FERC held and the D.C. Circuit affirmed, because Southern Union sold a substantial volume of gas in interstate

---

[3] Consolidated's application relating to the August 24, 1956 contract, for example, stated as follows:

> All of the gas from the wells to which this Application relates has heretofore been sold to Southern Union Gas Company for *intra*state sale. . . . This Application is necessary as a result of the Assignment of the above-described Gas Purchase Contract from Southern Union Gas Company to [Southern Union] Gathering Company, which assignment *will result in sales of gas from said wells in interstate commerce.*

"Application for Certificate of Public Convenience and Necessity," FPC Docket No. CI64-24 (July 2, 1963) at 10 (emphasis supplied).

[4] Consolidated argued, and the New Mexico trial court found, that Southern Union had the "sole ability" to determine whether Consolidated's gas would flow through the jurisdictional gathering system described above or through a separate non-jurisdictional gathering system that Southern Union began to operate in 1970. Pet. App. 87a. While the New Mexico Supreme Court found that it was "abundantly clear" that the gas sold under the four contracts was dedicated to interstate commerce, and that gas so dedicated "cannot be removed from federal regulation unless the FPC approves abandonment," it nevertheless affirmed the trial court. Pet. App. 70a, 74a.

commerce, the FPC and its successor, the FERC, had the exclusive power to regulate the rates and conditions for sales of gas by Consolidated to Southern Union. Pet. App. 18a; *Consolidated Oil & Gas, Inc. v. FERC*, 806 F.2d 275 (D.C. Cir. 1986).[5] Accordingly, Consolidated charged and was paid the federal ceiling price for its sales to Southern Union. Periodically, when the federal ceiling price was increased, Consolidated sought and obtained an increase up to the federal ceiling level, including the bonus prices available to small producers. Joint Appendix at 614-618 (D.C. Cir., filed March 4, 1988).

2. The 1976 Settlement Agreement

In 1974, natural gas producers in the San Juan Basin, including Consolidated, brought suit against Southern Union to enforce the most favored nations provisions of certain intrastate gas purchase contracts. The four contracts described above, because they concerned interstate gas, were not involved in the 1974 producer litigation. In 1976, while an appeal of partial summary judgment in Southern Union's favor was pending, Southern Union reached a settlement in principle with Aztec Oil and Gas Company, its largest supplier and the leading litigant in the intrastate gas litigation. Southern Union then offered to settle with over 100 other producers on the same basic terms. Pet. App. 70a-72a.

In June 1976, Southern Union prepared a draft of an agreement settling Consolidated's claims under six intrastate contracts. Consolidated refused to enter the settlement agreement, however, unless the four interstate contracts with Southern Union—which were not at issue in the litigation—were included in the settlement agreement as well. Southern Union acceded to this demand and modified the draft settlement agreement to encompass the four interstate contracts; those contracts were to be mod-

---

[5] The D.C. Circuit's decision is reprinted as an Appendix to this brief.

ified to provide terms more favorable to Consolidated. When the settlement agreement was revised, however, a conforming change was not made to the recital which described all of the gas covered by the settlement agreement as intrastate gas "not subject to regulation by the Federal Power Commission." This discrepancy was overlooked by both parties. Pet. App. 71a-72a.

On December 1, 1976, Consolidated demanded, on the strength of the mistaken recital, that Southern Union pay intrastate prices for gas being sold under the four interstate contracts. At that time, as a result of the energy crisis, the federal price ceilings governing interstate gas were significantly lower than the prices commanded by unregulated intrastate gas. Southern Union refused to pay Consolidated the higher intrastate prices on the ground that it would be illegal to do so under federal law, and continued to pay Consolidated the maximum federal ceiling price for the gas.

B. The New Mexico Litigation and the August 1984 FERC Declaratory Order

Three years later, in 1979, Consolidated sued Southern Union in New Mexico state court, alleging breach of contract. The alleged breach was Southern Union's failure to pay intrastate prices for gas sold under the four interstate contracts.[6] Consolidated sought specific performance of the settlement agreement and damages equal to the difference between the regulated interstate prices Southern Union had been paying under the four interstate contracts—the maximum prices allowed under federal regulations in effect at that time—and the higher prices it had been paying for gas under the six intrastate contracts. Pet. App. 3a, 73a-74a.

---

[6] In 1980, Consolidated amended its complaint to allege fraud and deceit as well. Pet. App. 73a.

In 1980, Southern Union petitioned the FERC for a declaratory order that the gas being sold under the four contracts at issue was subject to the jurisdiction of the Commission and that Consolidated could not lawfully collect a price for such gas in excess of the maximum price permitted by federal regulations. Southern Union simultaneously asked the New Mexico trial court to stay its proceedings pending FERC action. The trial court denied Southern Union's motion to stay, but referred two questions to the FERC: (1) whether the gas sold under the four contracts was subject to federal jurisdiction, and, if so, (2) what were the maximum prices that could be paid for that gas under federal law. Pet. App. 17a-18a.

On August 20, 1984, the FERC issued an order holding that it was "beyond doubt" that all of the gas sold by Consolidated to Southern Union under the four contracts was subject to federal jurisdiction.[7] Pet. App. 18a. While the FERC stated that it would not exercise jurisdiction "over the contractual aspects of this case," the Commission concluded, citing this Court's opinion in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) ("*Arkla*"), that: "If a court were to award damages for breach of contract on the basis of a rate in excess of that permitted under Consolidated's [small producer] certificate, Consolidated would be required to seek specific authorization from this Commission before collecting any such rate."[8] *Id.* at 23a.

The Commission denied Consolidated's request for rehearing, finding that the issues addressed in its August

---

[7] Under its small producer certificate, Consolidated was entitled to the contract rate or the applicable ceiling rate, whichever was lower. Pet. App. 19a. Because the Commission did not know the contract rates, it set forth only the ceiling rates. *Id.*

[8] The Commission also reserved its right to determine whether damages awarded for fraud would constitute payments in excess of federal price ceilings. Pet. App. 24a.

1984 order were "clearly within the Commission's primary jurisdiction." Pet. App. 35a. The Commission noted, however, that it would have to evaluate the lawfulness of a specific damage award by the New Mexico court in light of "a number of factors." *Id.* at 34a. The Commission therefore invited Southern Union to renew its petition, if necessary, once the state court had ruled. *Id.* at 25a, 34a, 44a. In short, while the FERC elected to abstain "in the absence of an actual damage award," it did not "waive its jurisdiction over Consolidated's sales and the rates at which those sales are made." Pet. App. 34a-35a, 44a.

Consolidated petitioned for review of the FERC's order, challenging the Commission's jurisdiction as well as its specific findings. In 1986, the order was affirmed by the D.C. Circuit. Resp. App. 2a. Consolidated did not file a petition for a writ of certiorari.

On the same day that the FERC issued its August 1984 declaratory order, Consolidated amended its state court complaint to allege that Southern Union was liable for negligent misrepresentation in connection with the mistaken recital in the settlement agreement. Ultimately, Consolidated elected not to pursue its original breach of contract claim at trial, and presented arguments and evidence to support only its negligent misrepresentation and fraud theories. Pet. App. 68a.

On May 21, 1985, the New Mexico trial court found Southern Union liable for negligent misrepresentation. On this basis, the trial court held that Consolidated was injured and was entitled to damages "equal to the difference between what it was paid by Southern Union under the settlement agreement and the amount it would have been paid had the representations of Southern Union been true"— *i.e.*, the difference between intrastate prices and the FERC-mandated interstate rates. Using Consolidated's damages calculation, the trial court awarded damages of $8,427,978, together with interest, which it characterized as the "benefit of the bargain" made in the settlement

agreement between Consolidated and Southern Union. The trial court rejected Consolidated's fraud claims. Pet. App. 4a, 11a.

On August 9, 1985, Southern Union asked the New Mexico trial court to stay execution of its judgment subject to appeal and to a decision by the FERC and the federal courts (which Southern Union said it would seek) as to "whether it would be legal under federal law for [Southern Union] to pay such a judgment."[9] The trial court denied this request on August 21, 1985. Southern Union then sought the same relief from the New Mexico Supreme Court. This request was denied on October 2, 1985.

C. The June 1986 FERC Declaratory Order

Two weeks later, on October 16, 1985, Southern Union filed with the FERC a petition for an order declaring that Consolidated could not collect the New Mexico damage award because it would constitute a payment for gas in excess of applicable federal ceiling prices, thereby violating Sections 4 and 16 of the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717c and 717o, and Sections 103 and 104 of the Natural Gas Policy Act ("NGPA"), 15 U.S.C. §§ 3313-14. Southern Union argued that, under this Court's decision in *Arkla*, the New Mexico court's award of "benefit of the bargain" damages, as measured by the difference between the federal ceiling prices and intrastate prices, was preempted by federal law. Pet. App. 40a-41a.

On June 19, 1986, the FERC issued a declaratory order finding that "the court-awarded damages are tort damages and do not constitute unlawful adjustments in the rates collected under the gas purchase contracts." The Commission cited as controlling precedent its earlier decision in *Gulftide Gas Corporation*, 31 FERC (CCH) ¶ 61,288 (1985), in which it found that a state court award of exemplary damages for fraudulent misrepresentation in con-

---

[9] Defendants' Motion to Approve Supersedeas Bond at 3 (N.M. Dist. Ct., filed Aug. 9, 1985).

nection with a contract did not conflict with price regulation under the NGPA. Pet. App. 41a, 49a-52a.

The FERC denied Southern Union's request for rehearing on May 22, 1987. Pet. App. 54a-56a. On May 28, 1987, Southern Union petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the June 1986 declaratory order and the subsequent order denying rehearing.

D. The New Mexico Supreme Court Decision

On July 9, 1987, while Southern Union's petition for review of the June 1986 FERC order was pending, the New Mexico Supreme Court affirmed the trial court's judgment. In rejecting Southern Union's federal preemption argument, the Court relied on the FERC's order, concluding that the "pre-emption argument advanced by [Southern Union] has been effectively answered in the appropriate federal forum." Pet. App. 78a. This Court denied Southern Union's petition for certiorari on February 22, 1988. 108 S. Ct. 1021. On March 25, 1988, Southern Union paid Consolidated $11,976,376 in damages and interest.

E. The D.C. Circuit Decision

After the New Mexico Supreme Court's opinion was issued in July 1987, the FERC requested and received a deferral of Southern Union's petition for review in the D.C. Circuit so that the Commission could reconsider its orders. On November 20, 1987, the Commission issued a third declaratory order. While it admitted having "reservations concerning the legal sufficiency of the June 19 order and the correctness of its holding," the Commission's new order reaffirmed its basic conclusion that the New Mexico court's damage award did not constitute a payment in excess of applicable federal price ceilings. Pet. App. 57a-58a.

The Commission, however, disavowed its principal rationale for reaching this conclusion. Specifically, it ac-

knowledged that its decision in *Gulftide Gas* "does not control this case" because neither fraudulent conduct nor exemplary damages were involved here. Pet. App. 61a-62a. Thus, in this last order, the Commission distinguished *Arkla* only on the ground that it dealt with "breach of contract judgments," whereas "[i]n the present case, the judgment was awarded for negligent misrepresentation." *Id.* at 65a.

On review, Southern Union argued that the FERC's declaratory orders were inconsistent with this Court's decision in *Arkla* and, if permitted to stand, would effectively undermine uniform federal regulation of interstate gas prices. Consolidated intervened in the appeal and filed a brief that supported the FERC's orders, but then argued in the alternative that the FERC lacked jurisdiction to issue these orders. Specifically, Consolidated argued that the doctrine of issue preclusion required the FERC and the federal courts to give preclusive effect to the New Mexico state court's opinion on the federal preemption question.[10] Pet. App. 6a-7a.

On September 23, 1988, the D.C. Circuit granted Southern Union's petition for review and set aside the FERC's orders. On the merits, the Court concluded that the FERC erred in holding that Consolidated's damage award could be collected under federal law. The Court found that the state court "judgment here is indistinguishable from the one that was disapproved in *Arkla*, except for the stated basis of the liability for damages," and that tort (as opposed to contract) liability "is an inadequate basis upon which to distinguish *Arkla*." Pet. App. 10a-12a.

On the jurisdictional issues, the D.C. Circuit rejected Consolidated's argument that the doctrine of issue preclu-

---

[10] Consolidated also argued that the FERC lacked jurisdiction because this case "does not involve the sale of natural gas." Pet. App. 6a. The D.C. Circuit rejected this argument and Consolidated did not raise it on rehearing, nor does it raise it in its petition to this Court.

sion barred the FERC and the federal courts from resolving the merits of Southern Union's federal claim. First, the Court observed that in its August 1984 declaratory order the FERC—in response to the trial court's inquiry—had explicitly exercised its jurisdiction over the preemption question and reserved its right to decide whether a damage award would be collectible under federal law. "Consolidated's petition for review of that [1984 FERC] order made no issue of this reservation of right, and we fully affirmed the then-contested portions of FERC's determination." Pet. App. 7a.

Second, the Court concluded that application of the doctrine of issue preclusion would not be fair to Southern Union. Specifically, the Court noted that when Southern Union had petitioned this Court for a writ of certiorari to the New Mexico Supreme Court in 1987, Consolidated had "opposed in part by an apparent reference to the instant [federal] proceedings." Thus, given the "distinct possibility that the Court may have declined to issue the writ in deference to the pendency of the proceedings below," the D.C. Circuit concluded that application of the doctrine of issue preclusion was inappropriate in this case. Pet. App. 7a-8a.

On November 7, 1988, Consolidated petitioned for rehearing and requested rehearing *en banc* on both the preemption question and the issue preclusion question. Contrary to the suggestion in Consolidated's petition, the FERC supported Consolidated's request on the preemption question, but not on the issue preclusion question.[11] *See* Pet. 9. The panel denied the petition for rehearing and

---

[11] The FERC stated: "We do not, however, support the petition for rehearing in its view (at 3-9) that this Court was barred from reaching a different decision from that of the state court on principles of comity or issue preclusion." Response of the Federal Energy Regulatory Commission to Petition for Rehearing at 7 n.3 (D.C. Cir., filed Jan. 3, 1989).

the court denied the request for rehearing *en banc*, with three judges dissenting. Acknowledging that "[t]here is no doubt that the federal filed rate doctrine *preempts* state law," Judge Williams stated that the dissenters would grant rehearing to determine "whether anything about the filed rate doctrine requires exclusive jurisdiction." Pet. App. 98a.

F. Consolidated's Bankruptcy and Related Proceedings

Four days after the D.C. Circuit issued its opinion in September 1988, the New Mexico Supreme Court—unaware of the D.C. Circuit's opinion—issued an order denying Southern Union's appeal of an award of approximately $350,000 in post-judgment interest. At this time, Southern Union had become increasingly concerned with the precarious financial condition of Consolidated. While Southern Union was confident that the D.C. Circuit's decision was correct, it was not confident that Consolidated would have sufficient resources to enable Southern Union to recover the $12 million in damages and interest it had paid in 1988 (or the $350,000 interest award the New Mexico court had just upheld) by the time the D.C. Circuit's decision became final and the FERC ultimately ordered a refund of those amounts.

Accordingly, on October 12, 1988, Southern Union filed a motion with the New Mexico Supreme Court seeking rehearing and relief from judgment in light of the D.C. Circuit's ruling. Consolidated purports to quote Southern Union's motion as arguing that relief was appropriate because "the [New Mexico] Court's opinion on the preemption question has now been reversed" by the D.C. Circuit. Pet. 10. This quotation is inaccurate and mischaracterizes Southern Union's argument. What Southern Union, in fact, argued was that because the New Mexico Supreme Court had "relied on a June 19, 1986 declaratory order" of the FERC, it ought to reconsider its decision in light of the D.C. Circuit's reversal of the FERC order. Brief in Sup-

port of Appellants' Motion for Rehearing and Relief from Judgment at 3 (N.M. Sup. Ct., filed Oct. 12, 1988). Thus, Southern Union concluded: "Since the *fundamental legal basis* for the [New Mexico] Court's opinion on the preemption question has now been reversed, rehearing is appropriate." *Id.* at 6 (emphasis supplied). On November 2, 1988, the New Mexico Supreme Court denied Southern Union's motion without opinion.

Southern Union then asked the New Mexico Supreme Court to stay or recall its mandate on the post-judgment interest award because Southern Union was contemplating filing a petition for a writ of certiorari on the question of whether the New Mexico Supreme Court had correctly resolved the merits of the preemption issue.[12] The Court denied Southern Union's request and, upon further consideration, Southern Union decided not to file the petition. *See* Pet. 10.

Instead, Southern Union decided to wait for the D.C. Circuit's decision to become final and then to seek a refund order from the FERC. Accordingly, once Consolidated's petition for rehearing was denied in September 1989 and the mandate had issued, Southern Union filed a motion with the FERC seeking expedited execution of the D.C. Circuit's order and a refund of the $12 million in unlawful gas payments.[13] *See* Pet. 10.

---

[12] To be sure, Southern Union argued that, absent relief from some forum, it would be subject to conflicting obligations. *See* Pet. 10. At that time, because the D.C. Circuit's mandate had not issued, relief was not yet available from the FERC. That is why Southern Union initially sought relief from the New Mexico Supreme Court and contemplated seeking relief from this Court. As discussed below, however, because the D.C. Circuit's mandate ultimately did issue in September 1989, the FERC can now provide Southern Union with the relief it seeks simply by issuing a refund order.

[13] Because of the D.C. Circuit's decision, Southern Union decided not to pay the additional $350,000 in post-judgment interest to Consolidated.

In the meantime, on March 7, 1989, Consolidated filed a Chapter 11 petition for bankruptcy in the United States Bankruptcy Court for the District of Colorado. *In re Consolidated Oil & Gas, Inc.*, Case No. 89 B02873A (Bankr. D. Colo.). On September 1, 1989, the Bankruptcy Court approved a stipulation of the parties lifting the automatic stay imposed by 11 U.S.C. § 362 so that this case may be litigated to a conclusion.

REASONS FOR DENYING THE WRIT

Consolidated characterizes this case as one involving conflicting decisions of a federal Court of Appeals and a state court of last resort on a question of federal preemption. Significantly, however, Consolidated does not ask the Court to grant certiorari to resolve the merits of this apparent conflict. Instead, Consolidated asks the Court to review and reverse the Court of Appeals' conclusion that the FERC and the federal courts have jurisdiction to consider and resolve the preemption question.

Further review of this jurisdictional question is not warranted. First, as the opinion below correctly concludes, the FERC and the federal courts have exclusive jurisdiction to determine whether a state court's damage award is preempted by the uniform system of interstate natural gas price regulation mandated by the NGA and NGPA. Moreover, any issue concerning the FERC's jurisdiction over the preemption question in this case was litigated to a conclusion in the federal courts in 1986, before the state court judgment became final.

Second, the FERC properly exercised its jurisdiction over the preemption question at the outset of the state court proceeding, and reserved its right to determine whether a specific award of damages would be preempted by federal law. Southern Union accordingly informed the state courts that it would seek a final determination of the federal preemption question from the FERC and the

federal courts. Under these circumstances, this Court and the lower federal courts have consistently held that a state court's decision on a federal question does not preclude a party—particularly a state court defendant—from obtaining a final determination of that question in a federal forum.

Finally, the Court need not grant review in order to resolve the parties' dispute or to provide guidance to the lower courts. The decision of the Court of Appeals on the jurisdictional issue raised in Consolidated's petition is perfectly consistent with the decisions of this Court and the lower federal courts.

I. THE RULING BELOW WAS CLEARLY CORRECT

The question presented below was whether the FERC had erred in holding that this Court's opinion in *Arkla* did not require federal preemption of the New Mexico state court's damage award. The FERC had concluded that *Arkla* was inapposite principally because it involved an award of contract damages, not tort damages. As this case illustrates, however, given the ease with which breach of contract actions can be recast as tort actions, the effect of upholding the FERC's decision would have been to vitiate this Court's holding in *Arkla*, thereby undermining uniform federal regulation of interstate natural gas prices.

Consolidated does not ask the Court to review the Court of Appeals' judgment that the FERC erred in resolving the merits of the preemption question.[14] Instead, Consol-

---

[14] While Consolidated does not seek certiorari on the question, it suggests that the D.C. Circuit should have deferred to the FERC's resolution of the preemption question. Pet. 15-16. The federal courts of appeals are required, however, to set aside agency orders that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The D.C. Circuit properly concluded that the FERC did not meet this standard because the agency failed to articulate a rational explanation of why its decision was consistent with the law as set forth in *Arkla*. *See Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*,

idated challenges the jurisdiction of the FERC and the federal courts to consider and resolve the question of whether the New Mexico court's damage award is preempted by federal law. Put simply, Consolidated contends that a state court decision on an issue over which a federal agency and the federal courts have exclusive jurisdiction precludes the federal agency and courts from independently addressing and resolving that issue. In Consolidated's view, preclusive effect is required even where, as here, the federal agency expressly exercised its exclusive jurisdiction with respect to the federal question at the outset of the state court proceeding, and the defendant in the state court proceeding reserved its right to return to the federal agency and the federal courts for a final determination of the federal question. As the opinion below makes clear, Consolidated's argument is without merit.[15]

1. Since the only question raised in Consolidated's petition is whether the FERC and the federal courts could decide the federal preemption question, the starting point for Consolidated's argument should be an analysis of the scope of federal jurisdiction under the NGA and NGPA. Consolidated's petition, however, does not address this issue. It simply assumes that the state and federal courts

---

463 U.S. 29, 42-43 (1983); *Public Service Commission v. FERC*, 642 F.2d 1335, 1342 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 879 (1981). Significantly, the Commission has not sought certiorari on the merits of the preemption question either.

[15] Consolidated attempts to limit the scope of its argument by implicitly conceding the FERC's jurisdiction to address the preemption question and then contending only that the D.C. Circuit was precluded from reviewing and setting aside the Commission's order. Pet. 8, 15. The logic of Consolidated's argument, however, permits no such limitation. Suppose, for example, that the New Mexico court's judgment in this case had become final before the FERC issued its order on the preemption question. *Cf. Fritz v. FERC*, 876 F.2d 1224, 1227 (5th Cir.), *cert. denied*, 110 S. Ct. 232 (1989) (State Supreme Court decision issued before FERC order). Under Consolidated's reasoning, the state court's judgment would bind the Commission as well as the federal courts.

have concurrent jurisdiction to determine and enforce federal price ceilings for interstate natural gas. *See* Pet. 12.

As the Court below found, this assumption is wrong. Pet. App. 6a. Congress gave the FERC and the federal courts exclusive jurisdiction under the NGA and NGPA to determine and enforce first sale price ceilings for interstate natural gas. 15 U.S.C. §§ 717u, 3414. *Accord Schneidewind v. ANR Pipeline Co.*, 108 S. Ct. 1145, 1151 & n.6 (1988). This jurisdiction necessarily includes "the incidental power to determine whether in fact a state court action, however denominated, has the impermissible effect of infringing the exclusively federal prerogative."[16] Pet. App. 7a. Absent such jurisdiction, after all, state courts could readily undermine uniform federal regulation of interstate natural gas prices through the award of damages and other relief in state law actions.

That was precisely this Court's conclusion in *Arkla*. Faced with almost identical facts, the Court held that a state court award of damages in a breach of contract action involving natural gas purchase contracts was preempted by federal law. The Court observed that even if the Commission failed to exercise its jurisdiction over gas pricing issues under the NGA,

> the mere fact that respondents brought this suit under state law would not rescue it, for when Congress has established an exclusive form of regulation, "there can be no divided authority over interstate commerce." *Missouri Pacific R. Co. v. Stroud*, 267 U.S. 404, 408 (1925). Congress here has granted exclusive authority over rate regulation to the Commission. In so doing, Congress withheld the authority to grant retroactive rate increases or to permit collection of a rate

---

[16] *Accord Louisiana Land & Exploration Co. v. Amoco Production Co.*, 878 F.2d 852, 854 (5th Cir. 1989); *Fritz*, 876 F.2d at 1228.

> other than the one on file. It would surely be inconsistent with this congressional purpose to permit a state court to do through a breach-of-contract action what the Commission itself may not do.

453 U.S. at 580.[17] Thus, as Consolidated conceded in the Court below, "[t]he FERC's determination of the federal preemption issues is conclusive, since FERC has the jurisdiction to determine whether natural gas price ceilings are violated."[18] Consolidated Petition for Rehearing at 14 (D.C. Cir., filed Nov. 7, 1988), citing *Mississippi Power & Light v. Mississippi*, 108 S. Ct. 2428, 2439 (1988).

2. Any issue concerning the FERC's jurisdiction to decide the federal preemption question raised in this case was resolved by the federal courts in 1986. Contrary to the impression created by Consolidated's petition, the FERC held at the outset of this case that it had jurisdiction over the preemption question and expressly reserved its right to decide that question in light of an actual state court damage award. *Cf.* Pet. 4. To be sure, the Com-

---

[17] The Court went on to analogize the breach of contract claim in *Arkla* to the common-law tort claim that it held was preempted under federal law in *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981). The Court indicated that "[a] system under which each state could, through its courts," establish different prices for interstate natural gas, "could hardly be more at odds with the uniformity contemplated by Congress" in enacting the NGA and NGPA. *Arkla*, 453 U.S. at 580 (quoting *Kalo*, 450 U.S. at 326).

[18] The three judges who dissented from the denial of rehearing *en banc* stated that they would consider further "whether anything about the filed rate doctrine requires exclusive jurisdiction." Pet. App. 98a. What *Arkla* makes clear, however, is that it is the exclusive jurisdiction over gas pricing issues conferred on the FERC and the federal courts by statute that gives those federal forums the jurisdiction to decide ultimately whether a state court damage award must be preempted under the filed rate doctrine. *See also Mississippi Power & Light v. Mississippi*, 108 S. Ct. 2428, 2440, 2442 (1988).

mission stated in its first declaratory order that it would not exercise jurisdiction "over the contractual aspects of this case." Pet. App. 23a. But the Commission, citing *Arkla*, went on to hold that "Consolidated would be required to seek specific authorization from this Commission before collecting" "damages for breach of contract on the basis of a rate in excess of that" permitted under federal regulation. *Id.* The Commission also reserved its right to determine whether damages awarded for fraud would constitute payments in excess of federal price ceilings. *Id.* at 24a. Thus, while the FERC elected to abstain "in the absence of an actual damage award," it expressly stated that it did not "waive its jurisdiction over Consolidated's sales and the rates at which those sales are made."[19] *Id.* at 34a.

Consolidated petitioned for review of this order. As the Court below observes, however, Consolidated's petition "made no issue of [the FERC's] reservation of right" "to exercise jurisdiction in the event that state-awarded tort damages effectively increased Consolidated's rate over" that permitted by federal law. Pet. App. 7a. Moreover, in rejecting the arguments that Consolidated did raise in its petition for review of the FERC's August 1984 declaratory order, the Court of Appeals concluded that:

> If, as we hold, the Commission was correct in finding that the sales were jurisdictional, then Consolidated was entitled only to the lawful sale price under the NGA and not any higher settlement price.

---

[19] Consolidated is therefore simply mistaken in stating that the Commission declined to exercise jurisdiction over the issue of whether "tort damages would be permissible." *Compare* Pet. 4 *with* Pet. App. 7a, 34a-35a, 44a. While the FERC referred only to damages for breach of contract and fraud, that is because Consolidated's complaint at that time alleged only breach of contract and fraud; the complaint was subsequently amended to allege negligent misrepresentation. Pet. App. 73a.

Resp. App. 12a. Consolidated did not petition this Court for review of the D.C. Circuit's 1986 judgment.

In short, if there was any doubt about the FERC's jurisdiction over the federal preemption question raised in this case, it was resolved by the Commission and the federal courts in 1986—well before the New Mexico state court litigation was completed. The arguments advanced by Consolidated in the Court below and in its petition here, therefore, amount to nothing less than a collateral attack on a final judgment concerning the Commission's jurisdiction over the preemption issue. As such, these arguments were properly rejected by the Court of Appeals.[20]

3. As the opinions of this Court and the lower federal courts demonstrate, even if the FERC had not exercised its exclusive jurisdiction over the federal preemption question at the outset of the state court proceeding, the Commission and the federal courts still would not be required to give preclusive effect to the New Mexico court's decision on that question.

a. In defending against Consolidated's state court action, Southern Union informed the state court that it was reserving its right to seek a determination from the FERC and the federal courts as to whether Consolidated could lawfully collect any damages awarded. Given this reservation of right, and the FERC's initial decision to abstain, Southern Union was entitled to return to the FERC and the federal courts for a final decision on the preemption question in light of the state court's judgment.

Consolidated disagrees with this conclusion. It argues that once Southern Union raised the federal preemption issue in the state court, it lost its right to seek affirmative

---

[20] *See, e.g., National Association of Regulatory Utility Comm'rs v. FERC*, 823 F.2d 1377, 1382 (10th Cir. 1987); 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 3536 (1984). *See also Louisiana Land & Exploration*, 878 F.2d at 854.

relief from the FERC and the federal courts, citing this Court's decision in *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). Pet 12.

This is not, however, what *England* holds. In *England*, the Court addressed the question of whether a plaintiff who invoked a federal court's jurisdiction to decide a federal question, and was subsequently relegated to state court under the doctrine of *Pullman* abstention, can fully litigate his state law claims without jeopardizing his ability to return to the federal forum for a decision on the federal question. As Consolidated notes, the Court stated that if a plaintiff "freely and *without reservation*" litigates his federal claims in state court, he "forgo[es] his right to return to the District Court." 375 U.S. at 419 (emphasis supplied). But the Court went on to add that a plaintiff may preserve his right to a federal forum by informing the state court that he intends "to return to the District Court for disposition of his federal contentions." *Id.* at 421. Thus, absent an explicit reservation, the plaintiff's right to return to the federal forum will be denied only where he "voluntarily" and "fully" litigates his federal claims in state court. *Id.* "When the reservation has been made, however, his right to return will *in all events* be preserved." *Id.* at 421-22 (emphasis supplied).

This rule, the Court continued, must apply with even greater force to defendants in state court actions. If a defendant has a right to federal adjudication of a federal question, the plaintiff's choice of a state forum "cannot impair [this] right." *Id.* at 422 n.13. A defendant may "protect his right" by choosing one of two courses of action: he may elect (1) not to litigate the federal question in the state court, or (2) to litigate the federal question in the state court, but "with the appropriate reservation" of right to return to the federal forum. *Id.*

In this case, Southern Union initially sought to take the first course of action—*i.e.*, it sought to litigate the federal

preemption question at the FERC. When the Commission exercised its jurisdiction over the preemption question, but then abstained from resolving it in the absence of an actual damage award, Southern Union decided to take the second course of action—*i.e.*, it raised the federal preemption argument in the state court, but reserved its right to have the FERC and the federal courts finally resolve the issue in the event that the state court awarded damages to Consolidated.[21] Under *England*, Southern Union thereby preserved its right to have the FERC and the federal courts hear and finally decide its federal preemption claim.

b. There is no conflict between the New Mexico courts and the Court of Appeals concerning the exclusive jurisdiction of the FERC and the federal courts with respect to interstate gas pricing issues. The trial court, aware that

---

[21] As Consolidated told the New Mexico Supreme Court, Southern Union "urged the trial court, as well as this court, to recognize that the FERC has exclusive and primary jurisdiction over the issues in this case." Appellee's Reply Brief at 27 (N.M. Sup. Ct., filed July 7, 1986).

Indeed, after the trial court issued its opinion in July 1985, Southern Union asked both the trial court and the New Mexico Supreme Court to grant a stay of judgment to allow it "to seek review by the FERC and the federal courts of federal issues concerning plaintiff's right to collect the judgment in this case." Motion to Review and Modify Action on Supersedeas and Stay at 4-5 (N.M. Sup. Ct., filed Sept. 24, 1985). Southern Union specifically informed the New Mexico Supreme Court that "further related proceedings will be held before the FERC (with possible federal court review) if the [state court] judgment is sustained on appeal." *Id.* at 4.

To be sure, as Consolidated notes, Southern Union urged the New Mexico Supreme Court not to defer to the FERC's June 1986 declaratory order on the preemption question. It did so, however, because "[t]he fact is that the June 19, 1986 FERC Order is incorrect." Appellants' Reply Brief at 19 (N.M. Sup. Ct., filed Aug. 5, 1986). Southern Union expressly told the Court that it had filed a request for rehearing with the FERC (*id.*), and, as noted above, Southern Union's petition for review was pending in the D.C. Circuit when the New Mexico Supreme Court issued its decision.

the FERC had already exercised its jurisdiction and reserved its right to resolve the preemption question, concluded that it had jurisdiction to consider "the construction of the settlement agreement and the common law tort claims." Pet. App. 91a. Similarly, in addressing Southern Union's federal preemption argument, the New Mexico Supreme Court simply reiterated the analysis of the FERC's June 1986 declaratory order, concluding that the preemption question "has been effectively answered in the appropriate federal forum." *Id.* at 78a. Even Consolidated concedes that the New Mexico Supreme Court "relied on" the FERC's June 1986 order. Pet. 8 n.5.

c. But even assuming that the New Mexico courts had decided the preemption question independently, the Commission and the Court of Appeals still would not be required to give the New Mexico judgment preclusive effect. This Court and the lower federal courts have consistently held that a state court decision on a federal question generally will not have preclusive effect where, as here, Congress has conferred exclusive jurisdiction over the question to a federal agency or the federal courts.[22]

---

[22] *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 376, 380-83 (1985); *Nanavati v. Burdette Tomlin Memorial Hospital*, 857 F.2d 96, 111-15 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1528 (1989); *Cullen v. Margiotta*, 811 F.2d 698, 732 (2d Cir.), *cert. denied*, 483 U.S. 1021 (1987); *A.L.T. Corp. v. Small Business Administration*, 801 F.2d 1451, 1455, 1462-63 (5th Cir. 1986); *Eichman v. Fotomat Corp.*, 759 F.2d 1434, 1437 (9th Cir. 1985).

The principal cases Consolidated cites (including *England*), in contrast, involve constitutional questions, over which both state and federal courts have jurisdiction, or actions brought under 42 U.S.C. § 1983. Unlike the NGA and NGPA, Section 1983 was designed to "add[ ] to the jurisdiction of the federal courts, not subtract[ ] from the jurisdiction of the state courts." *Allen v. McCurry*, 449 U.S. 90, 99 (1980). *See also Mississippi Power & Light*, 108 S. Ct. at 2439-40, 2442; *Arkla*, 453 U.S. at 580. In *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656 (1961), the Court held that the Natural Gas Act did not preclude state courts from hearing "traditional common-

For example, in *Marrese*, this Court held that because the federal courts have exclusive jurisdiction to hear federal antitrust claims, even *plaintiffs* who file suits in state court and do not prevail may nevertheless be able to file subsequent antitrust actions in federal court based on "the same events underlying their unsuccessful state court actions." 470 U.S. at 376. Generally, the Court observed, "a state judgment will *not* have claim preclusive effect on a cause of action within the exclusive jurisdiction of the federal courts."[23] *Id.* at 382 (emphasis in original). As the Second Circuit concluded, it follows from this decision that a party that finds itself a *defendant* in state court—as Southern Union did here—should not be deprived of an exclusively federal remedy simply because it raises, and the state court rules on, a federal question.[24] *Andrea The-*

---

law" contract claims involving the purchase of gas where "[n]o right [was] asserted under the Natural Gas Act." 366 U.S. at 663. Consistent with this precedent, the FERC declined to exercise jurisdiction "over the contractual aspects of this case." Pet. App. 23a. But there is no inconsistency between that action and the FERC's assertion of jurisdiction over the federal preemption question. Resp. App. 3a n.1.

[23] The Court held that federal courts in such cases should "look first to state preclusion law in determining the preclusive effects of a state court judgment," and noted that, in most cases, state law will require the state court to have "jurisdictional competency" before preclusive effect will be given to its judgments. 470 U.S. at 381-82. Consistent with the Restatement (Second) of Judgments, §§ 11, 12(2), 28(3) & Comment E, 86, New Mexico preclusion law requires its state courts to have jurisdictional competency before their decisions will be given preclusive effect. *See Matsu v. Chavez*, 96 N.M. 775, 778, 635 P.2d 584, 587 (1981); *Eichman*, 759 F.2d at 1440 (Kennedy, J., concurring) (noting that the requirement of prior jurisdictional competency is "of near universal application"). Since the New Mexico courts do not have jurisdictional competency with respect to issues over which a federal agency or court has exclusive jurisdiction, including the federal preemption question at issue in the Court below, their decisions on such issues should not be given preclusive effect. *See, e.g., A.L.T. Corp.*, 801 F.2d at 1462-63; *Eichman*, 759 F.2d at 1437.

[24] The D.C. Circuit reached a similar conclusion when it rejected the

atres, Inc. v. Theatre Confections, Inc., 787 F.2d 59, 63 (2d Cir. 1986).

Indeed, if state courts can deprive federal courts and agencies of exclusive jurisdiction merely by asserting jurisdiction over an issue, then Congressional grants of exclusive jurisdiction will cease to have meaning. In Consolidated's view, once a plaintiff "has presented a federal question for resolution in the state courts," there is nothing a defendant can do to invoke the jurisdiction of the federal forum, unless the state court refuses to assume jurisdiction or this Court grants *certiorari* and reverses the state court's judgment. *See* Pet. 12. As this Court has observed, however, review of a state court determination, "even when available by appeal rather than only by discretionary writ of certiorari, is an inadequate substitute" for a federal determination of a federal question. *England*, 375 U.S. at 416. Thus, "[t]he possibility of appellate review by this Court of a state court determination may not be substituted, against a party's wishes, for his right to litigate his claims fully in the federal courts." *Id.* at 417.

Moreover, as *Arkla* and, more recently, *Mississippi Power & Light* illustrate, the FERC and the federal courts cannot rely on the state courts to observe—much less determine—the boundaries of exclusive federal jurisdiction. Given the heavy burden already placed on this Court's limited docket, and the fact that Congress expressly gave the federal courts of appeals the exclusive authority to review orders of the Commission under the NGA and NGPA, 15 U.S.C. §§ 717r(b), 3416(a)(4), it would be inappropriate (and, indeed, unnecessary) to rely solely on

---

jurisdictional arguments raised in Consolidated's earlier appeal. The Court observed that any New Mexico state court ruling concerning jurisdiction, "regardless whether [such] ruling agreed with the Commission's ruling, does not affect the Commission's authority to determine its own jurisdiction." Resp. App. 11a n.5. *See also Fritz*, 876 F.2d at 1228-31 (Court of Appeals accepted state court's "factual determinations," but independently decided the federal preemption question).

certiorari relief to insure that state courts do not intrude on the FERC's exclusive jurisdiction. *See, e.g., Lyons v. Westinghouse Electric Corp.*, 222 F.2d 184, 189 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955).

4. Having properly concluded that it was not required to give preclusive effect to the New Mexico state court's decision on the preemption question, the Court of Appeals went on to hold that preclusion would be inappropriate in this case. This conclusion is also clearly correct.

a. As the Court of Appeals observed, once the FERC decided the federal preemption question, only the federal courts of appeals could review that decision. Pet. App. 6a. Indeed, Southern Union's petition for review of the FERC's June 1986 order was pending before the D.C. Circuit when the New Mexico Supreme Court issued its opinion. Accordingly, when Southern Union petitioned this Court for a writ of certiorari to the New Mexico Supreme Court, it did not believe—for the reasons set forth in this brief—that a denial of its petition would preclude the D.C. Circuit from considering and resolving the merits of its pending appeal. Nor, apparently, did Consolidated. As the Court of Appeals notes, Consolidated opposed Southern Union's petition "in part by an apparent reference to the instant proceedings." Pet. App. 8a.

Consolidated claims that the Court of Appeals was "simply wrong" in reaching this conclusion. Pet. 8 n.5. According to Consolidated, it "did nothing more than bring to this Court's attention—as it was required to do—that the FERC ruling relied on by the New Mexico Supreme Court was 'pending in the United States Court of Appeals for the D.C. Circuit.' " *Id.* But Consolidated did more than this. At the close of its Brief in Opposition, Consolidated urged that Court to deny certiorari because "its holding might well interfere with the orderly development of the applicable principles at FERC and in the courts." Brief of Respondent in Opposition at 20. Since Southern Union's

petition for review of the June 1986 FERC order was then pending, the Court of Appeals was fully justified in concluding that there was a "distinct possibility that the [Supreme] Court may have declined to issue the writ in deference to the pendency of the proceedings below." Pet. App. 8a.

b. Moreover, since the New Mexico Supreme Court's decision relied on the FERC's order, if the Court of Appeals had given preclusive effect to that decision, it would have produced a patently irrational result in this case: it would have meant, in substance, that the Court of Appeals had given preclusive effect to the order it was reviewing. The irrational nature of this result is emphasized—indeed, exacerbated—by the fact that the FERC expressly disavowed the principal rationale of its June 1986 order (on which the New Mexico Supreme Court relied) when it issued its November 1987 "clarifying" order.[25] Given these circumstances, the Court of Appeals properly concluded that it would be inappropriate to give preclusive effect to the New Mexico court's decision.

5. Finally, there is no reason to believe, as Consolidated asserts, that permitting federal courts and agencies to decide questions over which they have exclusive jurisdiction, even in the face of a final state court judgment, will interfere with principles of comity and federalism. *See* Pet. 13-14. The Court below, for example, did not "review[ ] and purport[ ] to reverse" any of the state courts' factual findings or legal rulings on questions that the state courts had jurisdiction finally to decide. *See* Pet. 13 & n.8. To the contrary, the FERC and the D.C. Circuit deferred to the state courts' authority to hear the common law claims,

---

[25] Specifically, the Commission stated that its earlier decision in *Gulftide Gas*—on which both it and, consequently, the New Mexico Supreme Court had based their decisions—"does not control this case" because, unlike *Gulftide*, neither fraudulent conduct nor exemplary damages were involved here. Pet. App. 61a-62a.

to make findings of liability and to award damages relief. Pet. App. 13a. When such relief interferes impermissibly with a Congressionally-mandated scheme of uniform federal regulation, however, the state court's judgment must yield to federal interests. *Arkla*, 453 U.S. at 584. To be sure, this may vitiate the effect of the State court's judgment, but as this Court observed in *Arkla*: "Every preemption case involves a conflict between a claim of right under federal law and a claim of right under state law. A finding that federal law provides a shield for the challenged conduct will almost always leave the state law violation unredressed." 453 U.S. at 584. This is the nature of the Supremacy Clause.

Consolidated further argues that the D.C. Circuit's decision "will subvert the willingness of state courts to seek guidance from federal agencies and for those agencies to offer such guidance." Pet. 14. But there is no logical reason why this should be so. The state courts know that federal agency decisions are subject to appeal in the federal courts. Thus, if a state court's decision turns on a question that must be resolved by a federal agency, the state court can simply wait until the question is finally decided by the federal agency and the federal courts before rendering its own judgment. Since there is no reason to believe that the state courts generally will disregard the federal courts' right to review agency decisions, as the New Mexico courts did here, the Court of Appeals' decision is unlikely to have the effect Consolidated fears.[26]

---

[26] Far from being a "model for how a federal agency's opinion can be sought and considered" (Pet. 14-15), it was the New Mexico courts' conduct—*i.e.*, their refusal to stay their proceedings and judgments pending the outcome of the federal proceedings, and the New Mexico Supreme Court's decision to rely on the FERC's order (when review of that order was pending in the D.C. Circuit)—that gave rise to the duplicative litigation Consolidated complains of.

II. REVIEW OF THE RULING BELOW IS NOT NECESSARY TO RESOLVE THE PARTIES' DISPUTE OR TO PROVIDE GUIDANCE TO THE LOWER COURTS

Consolidated argues that certiorari is also appropriate here because, absent review, the parties' dispute will remain unresolved. Pet. 11. Review is not necessary, however, to resolve this dispute. If the Court denies certiorari, the FERC will be required by the D.C. Circuit's judgment to order Consolidated to refund to Southern Union $12 million in damages and interest Southern Union paid in 1988. Indeed, because Consolidated did not seek a stay of the D.C. Circuit's mandate, and that mandate subsequently issued to the FERC, Southern Union has already requested a refund order from the FERC. Once the refund order issues, Southern Union's claim can be adjudicated to a conclusion in the Bankruptcy Court.

Nor is review warranted here in order to provide guidance to the lower courts. On the question on which Consolidated has sought certiorari, the opinion below is perfectly consistent with this Court's decisions in *England* and *Marrese* and with the lower federal court decisions dealing with issues of res judicata in analogous procedural contexts. Given the absence of any conflict among the courts on the question presented by Consolidated, there is no occasion for this Court to engage in further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Of Counsel:

BRUCE E. HENDERSON
SOUTHERN UNION COMPANY
Austin, Texas

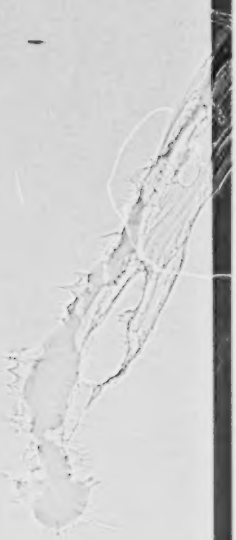
ROBERT H. LOEFFLER*
W. STEPHEN SMITH
LESLIE J. CLOUTIER
MORRISON & FOERSTER
2000 Pennsylvania Avenue, N.W.
Suite 5500
Washington, D.C. 20006
(202) 887-1500

Attorneys for Respondent
Southern Union Company

* *Counsel of Record*

January 18, 1990

APPENDIX



APPENDIX

United States Court of Appeals,
District of Columbia Circuit

No. 85-1191.

CONSOLIDATED OIL & GAS, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

Southern Union Gathering Company,
Intervenor.

Argued Feb. 13, 1986.
Decided Dec. 5, 1986.

Petition for Review from Orders of the Federal Energy Regulatory Commission.

Charles W. Garrison, with whom Richard G. Morgan and Peter C. Kissel, Washington, D.C., were on brief, for petitioner.

Andrea Wolfman, Atty., F.E.R.C., Washington, D.C., for respondent. William H. Satterfield, Gen. Counsel, Barbara J. Weller, Deputy Sol., and Leslie J. Lawner, Atty., F.E.R.C., Washington, D.C., were on brief for respondent.

Robert J. Haggerty, Washington, D.C., was on brief for intervenor. Bruce E. Henderson, Dallas, Tex., also entered an appearance for intervenor.

Before WALD, Chief Judge, SCALIA* and STARR, Circuit Judges.

---

* Judge (now Justice) Scalia was a member of the panel at the time this case was argued, but did not participate in this decision.

Opinion for the Court filed by Chief Judge WALD.

WALD, Chief Judge:

Consolidated Oil & Gas, Inc. (Consolidated), an independent oil and gas producer, petitions in this case for review of orders by the Federal Energy Regulatory Commission (FERC or Commission) asserting jurisdiction over certain sales of natural gas. Consolidated contends that the FERC misapplied the "commingling" doctrine in finding that it had jurisdiction, lacked substantial evidence for reaching that conclusion, and deprived Consolidated of both procedural and substantive due process. We affirm the Commission in all respects.

BACKGROUND

This case began with a state law contract dispute between Consolidated and Southern Union Gathering Company (Gathering Company) over favored nations pricing provisions. Gathering Company owns and operates gas gathering facilities in the San Juan Basin of New Mexico. It reports that it purchases gas from Consolidated and other New Mexico producers, commingles the gas from the various producers in its gathering facilities, and resells some of this gas intrastate and some of it interstate. In 1974, Consolidated sued Gathering Company in state court, arguing that gas purchase prices paid by Gathering Company to other producers activated favored nations clauses of contracts between Consolidated and Gathering Company. The parties settled their dispute in 1976 with regard to ten contracts in question. When Gathering Company refused to honor the settlement price with regard to four of these contracts, Consolidated, in 1979, again brought suit. Gathering Company argued in this second state court lawsuit that the gas purchased by it from Consolidated under the four contracts in question was gas sold by Consolidated in interstate commerce for resale and thereby was subject to FERC jurisdiction over price under the

Natural Gas Act (NGA), rendering the higher settlement price illegal. The state court referred the question of FERC jurisdiction to the Commission, *Consolidated Oil & Gas, Inc. v. Southern Union Co.*, No. SF 79-2161(c) (N.M.Dist.Ct. Aug. 4, 1980), Joint Appendix (J.A.) at 97, 98, and Gathering Company also asked the FERC for a declaratory order regarding jurisdiction.[1] The FERC entered an order declaring the gas sales in question to be subject to federal price ceilings under the NGA, 28 Fed. Energy Reg. Comm'n Rep. (CCH) 61,424 (¶ 61,225) (Aug. 20, 1984), J.A. at 123, and affirmed this order on rehearing. 30 Fed. Energy Reg. Comm'n Rep. (CCH) 61,708 (¶ 61,349) (Mar. 22, 1985), J.A. at 185. Because this assertion of federal jurisdiction would reduce the settlement price it could receive from Gathering Company, Consolidated petitioned this court for review of the FERC's orders. We now affirm the Commission.

Natural Gas Act Jurisdiction

The Natural Gas Act provides, in part, for regulation of "the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use." 15 U.S.C. § 717(b). In *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366, 85 S.Ct. 486, 13 L.Ed.2d 357 (1965), Lo-Vaca, an intrastate gathering company, sold gas to El Paso Natural Gas Co., an interstate pipeline, under contracts restricting that gas to intrastate use. The pipeline mixed, or commingled, Lo-Vaca's gas with gas purchased from other sources, and then sold some of the commingled gas interstate. The Fed-

[1] Gathering Company also asked the Commission to assert primary jurisdiction and take over the state law contract suit. The FERC declined to do so, and Gathering Company did not petition for review. Consolidated argues that the FERC's declination of primary jurisdiction on the ground that the state law contract suit is not important to the regulatory responsibilities of the Commission contradicts its determination that the gas sales in question were jurisdictional. We find no such inconsistency.

eral Power Commission (FPC), the FERC's predecessor agency, held that it had NGA jurisdiction over Lo-Vaca's sales to El Paso because "whether a transaction is in interstate commerce is determined by the essential character of the commerce, not necessarily by the contract." 26 F.P.C. 606, 612 (1961). The FPC noted that were it not to assert jurisdiction in a commingling case like this,

> [i]t would be possible for a pipeline to discriminate among producers by giving certain ones the privilege of selling to it the gas which by agreement would be deemed to be segregated from the interstate stream. . . . This may increase the cost to interstate customers and at the same time put them at a competitive disadvantage in obtaining additional supplies of gas.

26 F.P.C. at 613-14. The Supreme Court affirmed both the FPC's result and its reasoning, concluding that if the FPC could not assert jurisdiction in a case like this, an "attractive gap" would result in the regulatory scheme, because even if they had the power the producing states would "have little incentive" to regulate sales that result in higher costs to interstate customers. 379 U.S. at 370, 85 S.Ct. at 488.

—

In finding jurisdiction in the case at bar, the FERC relied squarely on *Lo-Vaca*. 28 Fed. Energy Reg. Comm'n Rep. (CCH) 61,424 (¶ 61,225) (Aug. 20, 1984), J.A. at 123. Indeed, the facts of the two cases are quite similar. In both cases, a number of suppliers sell gas to a middleman who commingles their gas and resells some in interstate commerce. In both cases, the litigating supplier asserts that its gas was intended by the parties to be used or resold only in intrastate commerce, thereby avoiding federal jurisdiction. Furthermore, contrary to Consolidated's argument, the fact that the middleman here is a gathering company that performs some functions (gathering) that

cannot be federally regulated,[2] whereas in *Lo-Vaca* the middleman was an interstate pipeline that performed only regulable functions (transportation and sales), is a distinction without relevance for this case: The issue here is whether the *sale* of gas from the supplier to the middleman is subject to NGA jurisdiction. Whether gathering company, interstate pipeline, or producer, an entity involved in a sale in interstate commerce of natural gas for resale is, with regard to that transaction, subject to NGA jurisdiction. *See Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035 (1954) (despite statutory exemption for the "production . . . of natural gas," a natural gas producer engaged in a sale in interstate commerce of natural gas for resale is subject to NGA jurisdiction).

Consolidated's other efforts to challenge the jurisdictional finding also fall short. First, Consolidated maintains that the Commission's decision in *Columbia Gas Transmission Corp.*, 10 Fed.Energy Reg.Comm'n Rep. (CCH) 61,230 (¶ 61,111) (Feb. 8, 1980), is in conflict with its order here. In *Columbia Gas*, the Commission failed to assert NGA jurisdiction over the sale of gas from a producer to a local distribution company (LDC) in the same state even though the gas was transported in an interstate pipeline in which it was commingled with gas bound interstate. The sale in *Columbia Gas*, however, was directly between the producer and the LDC, and could clearly be regulated locally. The FERC had jurisdiction over the *transportation* of the gas from the producer to the LDC, since it occurred in an interstate pipeline, but not over the sale. Here, the sales involved are between the producer and the gathering company, which in turn sells some gas interstate and some intrastate. New Mexico has no authority to regulate the initial producer-to-gathering company sales since the end-

---

[2] 15 U.S.C. § 717(b) provides that the NGA shall apply to "natural gas companies engaged in [jurisdictional] transportation or sale" of natural gas, but not to the "production or gathering of natural gas."

users are not definably local, and the gathering company possesses the same theoretical potential to favor intrastate over interstate channels in designating the destination of particular sources of gas that the Court seemed concerned about in *Lo-Vaca*.

Second, Consolidated claims that the Commission's decisions declining NGA jurisdiction in *City of Farmington v. Amoco*, 31 Fed.Energy Reg.Comm'n Rep. (CCH) 61,599 (¶ 61,290) (June 7, 1985); 32 Fed.Energy Reg.Comm'n Rep. (CCH) 61,648 (¶ 61,280) (Aug. 21, 1985), are inconsistent with its order here. Since the *Farmington* ruling is currently on petition for review to this court, *City of Farmington v. FERC*, No. 85-1680 (D.C.Cir. filed Oct. 18, 1985; argued November 3, 1986), we note only that *Farmington* presents a different factual situation from this case. The commingling in that case occurred in the producer's own gathering facility; that is, the producer drew gas from various wells, stored the gas all together in one facility, and then sold some intrastate and some interstate. Whether the *Lo-Vaca* "commingling" doctrine must be extended to include a producer's internal operations is at issue in that case but not in this one; the FERC has characterized *Farmington* as a split stream sale case, where the producer chooses how much gas to dedicate to the interstate market and sells it separately from the gas it sells intrastate. The intrastate portions of split stream sales are, of course, nonjurisdictional. *See, e.g., Columbia Gas Transmission Corp. v. Allied Chemical Corp.*, 652 F.2d 503, 516 n. 11 (5th Cir.1981); *Harrison v. FERC*, 567 F.2d 308 (5th Cir.1978); *Amoco Production Co.*, 23 Fed.Energy Reg.Comm'n Rep. (CCH) 61,429 (¶ 61,211) (May 9, 1983). Whatever the outcome in *Farmington*, it does not affect our decision that the sale of gas to an independent gathering facility that first commingles that gas with gas purchased from other suppliers and then sells the commingled gas both interstate and intrastate may be the subject of federal regulation under *Lo-Vaca*.

Finally, Consolidated attempts to resurrect the argument rejected in *Lo-Vaca* that the intent of the parties regarding the destination of the gas in question is dispositive of the jurisdictional issue. The teaching of *Lo-Vaca*, however, is that because sales to a middleman, who commingles gas of several suppliers and then resells the gas to both the intrastate and interstate markets, are not themselves regulable by the states, federal jurisdiction is required to avoid the creation of a regulatory gap.

In sum, we find this case sufficiently similar to *Lo-Vaca* to affirm the Commission's jurisdiction.

SUBSTANTIAL EVIDENCE

Consolidated maintains that the FERC's orders were not based on substantial evidence on the record, because the record on which the FERC based its jurisdictional finding contains only Gathering Company's allegations that Consolidated's gas was commingled in its gathering facility with gas from other producers and that some of this commingled gas was sold interstate. Petition of Southern Union Gathering Co. for the Institution of a Proceeding and for a Declaratory Order, filed March 25, 1980, J.A. at 2. Consolidated argues that an agency may not base its findings on mere allegations, and further contends that an agency especially may not do so when those allegations are contradicted.

Under the substantial evidence test, we can uphold the Commission's decision only if it relies on such "relevant evidence as a reasonable mind might accept as adequate to support [the] conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S.Ct. 456, 477, 95 L.Ed. 456 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 216, 83 L.Ed. 126 (1938)). It is clear, however, that "an agency may dispose of a controversy on the pleadings without an evidentiary hearing when the opposing presentations reveal that no dispute of

fact is involved. . . . " *Municipal Light Boards v. FPC*, 450 F.2d 1341, 1345 (D.C.Cir.1971), *cert. denied*, 405 U.S. 989, 92 S.Ct. 1251, 31 L.Ed.2d 455 (1972). This route may be taken when the movant's pleadings are unrebutted. 450 F.2d at 1346. In this case, Consolidated never did deny that its gas had been commingled and some of it sold interstate, as Gathering Company asserts. Consolidated instead argued to the FERC that the sale of the gas in question was not jurisdictional, and now claims that this argument constituted a denial of Gathering Company's factual assertions about commingling and interstate sale.[3]

---

[3] Consolidated supports its lack of substantial evidence argument with statements like (1) "it is obvious Consolidated disputes the assertion its gas is jurisdictional," Consol.Br. at 23, (2) "Consolidated clearly and vigorously disputed the essential material fact, that its gas sales were jurisdictional," Consol.Rep.Br. at 33, (3) "Not one shred of evidence exists in the record to prove [the] assertion . . . that all of Consolidated's gas is 'commingled' in [Gathering Company's] gathering facility," Consol.Br. at 26, (4) "no substantial evidence exists in the record of the proceeding that Gathering Company operated a *separate* intrastate line [to transport the nonjurisdictional gas sold in the six contracts not at issue in this proceeding]," Consol.Br. at 26 (emphasis in original), (5) "Consolidated denied Gathering Company's allegation that all the gas sold by Consolidated to Gathering Company under the four contracts in dispute was gas sold for resale in interstate commerce," Consol.Rep.Br. at 31, (6) "FERC ignores the representations and warranties Gathering Company made in the settlement agreement," Consol.Br. at 25.

Statements (1) and (2) address a legal, not factual issue. Statements (3) and (4) assume that Gathering Company's assertions do not constitute evidence, an argument we reject in the text. Statement (5) reiterates Consolidated's commingling argument that only the portion of its gas actually sold interstate can be jurisdictional, even if flowing from a commingled gathering facility. This argument is irrelevant to the factual determination of commingling and the existence of some interstate sales, the only issues involved in the substantial evidence test here. Additionally, if the premise of this argument were accepted, it would eliminate the commingling doctrine altogether. The Supreme

Consolidated's points regarding the jurisdictional status *vel non* of the sales in question, however, were and are legal ones, not factual ones. While findings of fact need be based

---

Court has not yet told us the time is ripe for that.

Statement (6) attempts to impeach Gathering Company's present assertions with the 1976 settlement agreement between the two parties, which declared that "[i]t is recognized that all of the gas sold by the Producer under the Contract was resold and consumed solely within the State of New Mexico and therefore such sales by the Producer were not subject to regulation by the Federal Power Commission." Settlement Agreement, June 28, 1976, at 2-3, J.A. at 41-42. Consolidated expanded on this point in oral argument, when after admitting that "we cannot assert the contrary" to Gathering Company's assertions regarding the fact of commingling, the following colloquy occurred:

> Consolidated: Whether Consolidated's gas is commingled in a stream that may or may not go interstate is a disputed fact.
>
> Court: How do you dispute it if one side says it is and the other side says we don't know? Is that all it takes to make a disputed fact?
>
> Consolidated: It's disputed in the record. Your Honor, in the record the settlement agreement, which Southern Union signed back in 1976, in which they made the representation that all of Consolidated's gas remains intrastate, was not resold in interstate commerce and was not commingled . . .

Our reading of the settlement agreement, however, reveals no representation regarding commingling, only the above-quoted declaration regarding intrastate resale. This declaration does not contradict the crucial underlying fact regarding commingling. To the extent it might be construed as stating a conclusion regarding jurisdiction, we reiterate that parties may not alter by contract the interstate character of commerce. *See* text, *supra*; *Lo-Vaca*, 379 U.S. at 369, 85 S.Ct. at 488; *Lo-Vaca*, 26 F.P.C. at 612. To the extent it might be construed as asserting that Consolidated's gas actually never flowed out of New Mexico, we should note that the New Mexico District Court has found that "[w]hen Southern Union represented to Consolidated, in the 1974 lawsuit and in the 1976 settlement agreement, that the gas it bought under certain contracts was resold and consumed solely within New Mexico, that representation was not true." Consolidated Oil & Gas, Inc. v. Southern Union Co., No. SF 79-2161(c) (N.M.Dist.Ct. May 21, 1985) (letter order

on substantial evidence, conclusions of law from uncontradicted facts need only be right. We hold that the FERC's reliance on Gathering Company's undenied assertions satisfied its burden under the substantial evidence test.

DUE PROCESS

Consolidated claims that the Commission failed to hold a hearing and thereby denied its procedural due process.[4] This claim suffers the same fate as Consolidated's substantial evidence argument. Since no material factual dispute exists, the FERC was not required to hold a hearing.

---

finding negligent misrepresentation by Gathering Company; damages of $11 million awarded to Consolidated), Consol.Br.App.Ad. at 24, 25. Although the FERC could not rely on the New Mexico court's finding, since it came after the FERC's orders regarding jurisdiction, the FERC did note Gathering Company's acknowledgment of the error in the settlement agreement as to the flow of the gas in question. 28 Fed.Energy Reg.Comm'n Rep. (CCH) 61,424 (¶ 61,225) (Aug. 20, 1984), J.A. at 123. The FERC might wisely have avoided any substantial evidence challenge by definitively resolving the contradiction between the settlement agreement and Gathering Company's later assertion regarding interstate flow through an investigation, hearing, or grant of discovery to Consolidated. Nevertheless, it was not unreasonable for the FERC to base its legal conclusion regarding jurisdiction on Gathering Company's assertion in the petition before it, unrefuted by Consolidated, that some of Consolidated's gas did flow interstate. Consolidated is certainly in an odd position to challenge the FERC's reliance on Gathering Company's later assertion, since the New Mexico District Court's $11 million judgment in its favor was based on the conclusion that Gathering Company's earlier representation was negligent and false.

[4] Consolidated also points to two sections of the NGA itself as sources of a hearing requirement, Consol.Rep.Br. at 28, but 15 U.S.C. § 717r(b) only requires that the Commission's findings be based on substantial evidence, and § 717d(a) only requires a hearing for the setting of rates. We have already determined, *supra*, that the Commission acted on substantial evidence, and petitioner's implication that because the determination of jurisdiction will influence the rates Consolidated may charge this is therefore a rate setting case cannot be taken seriously.

See, e.g., City of Ukiah v. FERC, 729 F.2d 793, 799-800 (D.C.Cir.1984); *Cerro Wire & Cable Co. v. FERC*, 677 F.2d 124, 129 (D.C.Cir.1982); *Cities of Batavia v. FERC*, 672 F.2d 64, 91 (D.C.Cir.1982).[5]

We can also dispense quickly with Consolidated's contention that by holding the sales in question to be juris-

---

[5] Consolidated raises two other procedural objections, each of which can be dispensed with quickly. First, Consolidated argues that the FERC issued its initial (August 20, 1984) order without notice to Consolidated. However, Consolidated and the Commission had exchanged letters responding to a letter from the Commission to Gathering Company indicating that the Commission staff would be presenting the case to the Commission within the next few months. Consolidated asked the FERC what the "next few months" meant, and the FERC responded that it meant either August or September, 1984. Record App. 202 & 204A. Additionally, on August 8, 1984, the Commission published a notice pursuant to 18 C.F.R. § 375.204 (1984), Consol.Br.App.Ad. at 15, 22, of the items to be considered at the August 15, 1984 meeting, which included Gathering Company's petition for a declaratory order.

Second, Consolidated contends that the FERC failed to give it the required 30 days to respond to Gathering Company's July 31, 1984 amendment to its petition, by issuing its order on August 20, 1984. The Commission admits for purposes of argument that the 30 day requirement of 18 C.F.R. § 385.213(d)(2) (1985) applies in this case, FERC Br. at 19 n. 16, but maintains that the proper procedure was for Consolidated to petition for rehearing, which it did. We agree that the full consideration the FERC gave Consolidated on rehearing obviates any procedural problems related to the initial order.

Consolidated also notes that the state court, having grown tired of waiting for the FERC to answer the jurisdictional question referred to it on August 4, 1980, decided some preliminary issues in the Consolidated-Gathering Company contract suit by assuming a lack of FERC jurisdiction. *Consolidated Oil & Gas, Inc. v. Southern Union Co.*, No. SF 79-2161(c) (N.M.Dist.Ct. July 25, 1984), J.A. at 104, 105. Consolidated maintains that this action rendered the subsequent (August 20, 1984) FERC order regarding jurisdiction to be arbitrary and capricious. We agree with the FERC, though, that "[t]he fact that the state court ruled on the same issue, regardless whether its ruling agreed with the Commission's ruling, does not affect the Commission's authority to determine its own jurisdiction." FERC Br. at 23.

dictional, the FERC denied it substantive due process, by depriving it of the settlement price. If, as we hold, the Commission was correct in finding that the sales in question were jurisdictional, then Consolidated was entitled only to the lawful sale price under the NGA and not any higher settlement price; thus, it was not deprived of any legal right by the FERC's refusal to approve the contract price.

Accordingly, the petition for review is *Denied.*

(3)

Supreme Court, U.S.
FILED
JAN 22 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-911

In the Supreme Court of the United States

OCTOBER TERM, 1989

CONSOLIDATED OIL & GAS INC., PETITIONER

v.

SOUTHERN UNION COMPANY AND FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

DAVID N. COOK
Acting General Counsel
JEROME M. FEIT
Solicitor
SAMUEL SOOPPER
Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

QUESTION PRESENTED

Whether the court of appeals properly exercised its jurisdiction to review an order of the Federal Energy Regulatory Commission that permitted petitioner, a natural gas producer, to collect a state court judgment against a natural gas gathering company based on the latter's refusal to pay certain contract prices for natural gas.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	6
Conclusion	11

TABLE OF AUTHORITIES

Cases:

A.L.T. Corp. v. *Small Business Admin.*, 801 F.2d 1451 (5th Cir. 1986)	9
Allen v. *McCurry*, 449 U.S. 90 (1980)	9, 10
Arkansas Louisiana Gas Co. v. *Hall*, 453 U.S. 571 (1981)	4, 5, 6, 7, 8, 10
Blonder-Tongue Laboratories, Inc. v. *University of Illinois Found.*, 402 U.S. 313 (1971)	10
Brown v. *Felsen*, 442 U.S. 127 (1979)	9
City of Tacoma v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958)	7
Consolidated Oil & Gas, Inc. v. *FERC*, 806 F.2d 275 (D.C. Cir. 1987)	3
Consolidated Oil & Gas, Inc. v. *Southern Union Co.*, 106 N.M. 719, 749 P.2d 1098 (1987), cert. denied, 484 U.S. 1063 (1988)	3
District of Columbia Court of Appeals v. *Feldman*, 460 U.S. 462 (1983)	9
Kalb v. *Feurerstein*, 308 U.S. 433 (1940)	9
Kremer v. *Chemical Constr. Corp.*, 456 U.S. 461 (1982)	9
Marrese v. *American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985)	9
Mississippi Power & Light Co. v. *Mississippi*, 108 S. Ct. 2428 (1988)	6, 9

Cases – Continued	Page
Montana-Dakota Utilities Co. v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951)	7
Nantahala Power & Light Co. v. *Thornburg*, 476 U.S. 953 (1986)	6, 7
Pan American Petroleum Corp. v. *Superior Court of Delaware for New Castle County*, 366 U.S. 656 (1961)	8
Schneidewind v. *ANR Pipeline Co.*, 108 S. Ct. 1145 (1988)	7
Southern Union Gathering Co., 28 F.E.R.C. ¶ 61,225 (1984), reh'g denied, 30 F.E.R.C. ¶ 61,350 (1985), aff'd *sub nom. Consolidated Oil & Gas, Inc.* v. FERC, 806 F.2d 275 (D.C. Cir. 1986)	3
Southern Union Co., 35 F.E.R.C. ¶ 61,369 (1986), reh'g denied, 39 F.E.R.C. ¶ 61,212, reaff'd, 41 F.E.R.C. ¶ 61,203 (1987)	4
Square D Co. v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986)	7
Statutes and rule:	
Natural Gas Act, 15 U.S.C. 717 *et seq.*	2
§ 4(a), 15 U.S.C. 717c(a)	6
§ 4(c), 15 U.S.C. 717c(c)	6
§ 4(d), 15 U.S.C. 717c(d)	6
§ 19, 15 U.S.C. 717r	4, 7
§ 22, 15 U.S.C. 717u	5
Natural Gas Policy Act, 15 U.S.C. 3301 *et seq.*	2
§ 504, 15 U.S.C. 3414	5
§ 506, 15 U.S.C. 3416	7
28 U.S.C. 1738	9
Sup. Ct. R. 14.1(a)	11
Miscellaneous:	
18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* (1981 & Supp. 1989)	9-10
Restatement (Second) of Judgments (1982)	9

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-911

CONSOLIDATED OIL & GAS INC., PETITIONER

v.

SOUTHERN UNION COMPANY AND FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 857 F.2d 812. The order of the Federal Energy Regulatory Commission permitting petitioner to collect the state court judgment (Pet. App. 40a-53a) is reported at 35 F.E.R.C. ¶ 61,359. The order of the Federal Energy Regulatory Commission denying rehearing (Pet. App. 54a-56a) is reported at 39 F.E.R.C. ¶ 61,212. The order of the Federal Energy Regulatory Commission reaffirming and clarifying its prior orders in the case (Pet. App. 57a-66a) is reported at 41 F.E.R.C. ¶ 61,203. The initial order of the Federal Energy Regulatory Commission (Pet. App. 14a-25a) and its order denying rehearing (Pet. App. 26a-39a) are reported at 28 F.E.R.C. ¶ 61,225, and 30 F.E.R.C. ¶ 61,350, respectively.

JURISDICTION

The judgment of the court of appeals (Pet. App. 93a-94a) was entered on September 23, 1988. A petition for rehearing was denied on September 12, 1989. Pet. App. 95a. The petition for a writ of certiorari was filed on December 7, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves the District of Columbia Circuit's review of a declaratory order of the Federal Energy Regulatory Commission holding that federal law did not prevent a natural gas producer, petitioner Consolidated Oil & Gas, Inc., from collecting a state court judgment obtained against a natural gas gathering company, respondent Southern Union Company.

1. During the 1960s and early 1970s, Southern Union purchased natural gas from Consolidated that was produced in the San Juan Basin area of New Mexico. Southern Union bought that gas under long-term contracts that contained "favored nation" clauses requiring Southern Union to pay Consolidated prices equal to the highest paid to any producer in the San Juan Basin. Four of those contracts involved gas sold for resale in interstate commerce and were thus subject to regulation by the Federal Energy Regulatory Commission under the Natural Gas Act (NGA), 15 U.S.C. 717 *et seq.*, and the Natural Gas Policy Act (NGPA), 15 U.S.C. 3301 *et seq.* Pet. App. 2a-3a, 15a-16a.

In 1979, after reaching a settlement agreement several years earlier, Consolidated filed an action against Southern Union in New Mexico state court. That action, which raised claims for breach of contract, fraud, and negligent misrepresentation, challenged Southern Union's refusal to pay an amount higher than the prevailing interstate rate on

four contracts for natural gas.[1] After a bench trial, the state court found that Southern Union had negligently misrepresented that the gas purchased under the four contracts was resold in intrastate markets, thereby inducing Consolidated to release certain claims resolved by the earlier settlement. Pet. App. 3a-4a, 41a-45a. The trial court awarded Consolidated compensatory damages of approximately $8.5 million, "which is the amount equal to the difference between what it was paid by SOUTHERN UNION under the settlement agreement and the amount it would have been paid had the representations of SOUTHERN UNION been true." *Id.* at 90a-91a.[2] The New Mexico Supreme Court affirmed that judgment. *Id.* at 67a-80a; *Consolidated Oil & Gas, Inc.* v. *Southern Union Co.*, 106 N.M. 719, 749 P.2d 1098 (1987), cert. denied, 484 U.S. 1063 (1988).

2. While Southern Union's appeal was pending before the New Mexico Supreme Court, Southern Union petitioned the Commission for a declaratory order "that Consolidated could not collect its judgment because to do so would con-

---

[1] Initially, the state trial court and Southern Union each sought rulings from the Commission concerning the jurisdictional status of the gas sold under those contracts. The Commission ruled that that gas was interstate gas for which Consolidated could not collect contract damages in excess of federal rates without first obtaining authority from FERC. Pet. App. 18a-19a, 27a-29a; *Southern Union Gathering Co.*, 28 F.E.R.C. ¶ 61,225, at 61,427 (1984), reh'g denied, 30 F.E.R.C. ¶ 61,350, at 61,708 (1985), aff'd *sub nom. Consolidated Oil & Gas, Inc.* v. *FERC*, 806 F.2d 275 (D.C. Cir. 1986). On Consolidated's motion for rehearing, the Commission later made clear that, if the situation arose, it would consider any actual award of damages in light of a number of factors, including the amount and basis of the damages, the relevant facts of the case, and the applicable legal principles. Pet. App. 34a; 30 F.E.R.C. ¶ 61,350, at 61,711.

[2] The trial court also awarded Consolidated prejudgment interest of approximately $2.6 million. Pet. App. 92a.

stitute exacting an unlawful price for interstate gas." Pet. App. 5a. Consolidated intervened and opposed that petition. *Id.* at 47a.

In its final order issued in November 1987,[3] the Commission denied Southern Union's petition. The Commission concluded that the damages awarded to Consolidated represented tort damages as opposed to contract damages, and thus were not compensation for interstate gas sold under the contracts. Pet. App. 62a-64a. The Commission distinguished this case from *Arkansas-Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981) (*Arkla*), since "under the specific facts presented here, the damages awarded do not constitute part of the price of gas," Pet. App. 65a. Accordingly, the Commission held that federal law governing interstate sales of natural gas did not preempt the New Mexico state court judgment and that Consolidated could lawfully collect that damages award. *Id.* at 65a-66a.

Southern Union then filed a petition for review of the Commission's final order in the District of Columbia Circuit. Pet. App. 2a; see Section 19 of the NGA, 15 U.S.C. 717r.[4]

3. In September 1988, the court of appeals granted Southern Union's petition for review, set aside FERC's order

---

[3] As the court of appeals noted, FERC "has entered three orders, all adverse to Southern Union, essentially on the grounds that the [state court] judgment is in fact an award of damages for tort and not for the purchase price of gas." Pet. App. 5a; see *id.* at 52a-53a, 55a-56a, 65a; *Southern Union Co.*, 35 F.E.R.C. ¶ 61,359, at 61,822 (1986), reh'g denied, 39 F.E.R.C. ¶ 61,212, at 61,745, reaff'd, 41 F.E.R.C. ¶ 61,203, at 61,529 (1987). In this case, the court of appeals reviewed only the Commission's final order reaffirming its earlier decisions. See Pet. App. 5a.

[4] In March 1988, while Southern Union's petition for review was pending before the court of appeals, Southern Union paid the state court judgment to Consolidated. See Pet. 7.

refusing to issue the declaratory order sought by Southern Union, and remanded the case to the Commission for further proceedings. Pet. App. 1a-13a. As a threshold matter, the court of appeals rejected Consolidated's claim that the Commission lacked jurisdiction to consider Southern Union's petition for a declaratory order. First, the court concluded that the Commission's statutory authority "to determine and enforce first-sale price ceilings for natural gas" includes "the incidental power to determine whether in fact a state court action, however denominated, has the impermissible effect of infringing the exclusively federal prerogative." *Id.* at 6a, 7a (citing 15 U.S.C. 717u, 3414, and *Arkla*, 453 U.S. at 578-582). Second, the court determined that the prior judgment of the New Mexico Supreme Court did not bar the Commission from considering Southern Union's petition under the doctrines of collateral estoppel and issue preclusion. Pet. App. at 7a-8a.

Turning to the merits of the Commission's ruling, the court of appeals held that the Commission misapplied the "filed rate doctrine" set forth in *Arkla*. Pet. App. 8a. In particular, the court determined that the Commission erred by not "examin[ing] the practical effect of the state remedy" in this case. *Id.* at 10a. The court reviewed the record and concluded that the state trial court awarded damages "that unquestionably were for the price of gas." *Id.* at 11a. In the court's view, "the state measure of damages is based upon, and has the effect of awarding, a price for interstate gas that, to the extent the price exceeds federal guidelines, the state court has no power to award." *Id.* at 12a. Accordingly, the court concluded that the "calculation of damages * * * employed by the New Mexico courts was inconsistent with preemptive federal gas-price regulation and that the Commission failed to follow the controlling *Arkla* case." *Id.* at 13a (internal quotation marks and citation omitted).

In September 1989, the court of appeals denied Consolidated's petition for rehearing and suggestion of rehearing en banc. Pet. App. 95a-97a.[5]

ARGUMENT

1. Petitioner Consolidated Oil & Gas, Inc., principally contends (Pet. 11-15) that the court of appeals lacked authority to nullify the New Mexico state court damages award in the context of reviewing the Commission's declaratory order. This claim cannot be reconciled with the system of regulation established by the Natural Gas Act.

Under Section 4(c) of the NGA, 15 U.S.C. 717c(c), sellers of natural gas, such as petitioner, must file rates charged for natural gas with the Commission; such rates are lawful only if the Commission determines that they are "just and reasonable." Section 4(a) of the NGA, 15 U.S.C. 717c(a). The Commission exercises exclusive authority to determine the reasonableness of filed rates and no seller of interstate gas may lawfully collect a rate higher than that filed and approved by the Commission. Section 4(d) of the NGA, 15 U.S.C. 717c(d); see, *e.g.*, *Mississippi Power & Light Co.* v. *Mississippi*, 108 S. Ct. 2428, 2439-2442 (1988); *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 963-965 (1986); *Arkla*, 453 U.S. at 576-577.

As this Court has recognized, the Commission exercises "exclusive jurisdiction over the transportation and sale of

---

[5] Judge Williams, joined by Chief Judge Wald and Judge Buckley, dissented from the denial of rehearing en banc on the ground that further review was necessary "to determine whether anything about the filed rate doctrine requires exclusive jurisdiction." Pet. App. 98a.

After rehearing was denied, Southern Union filed a motion with the Commission seeking an order requiring Consolidated to refund the state court judgment. That motion remains pending before the Commission. See Pet. 10.

natural gas in interstate commerce for resale," *Schneidewind* v. *ANR Pipeline Co.*, 108 S. Ct. 1145, 1151 (1988), which necessarily includes the power to fix and enforce rates for those transactions. Under the filed rate doctrine,[6] "the right to a reasonable rate is the right to the rate which the Commission files or fixes, and * * * except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its [*sic*] opinion, it is the only or the more reasonable one." *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251-252 (1951); see, *e.g.*, *Nantahala Power & Light*, 476 U.S. at 964-965; *Arkla*, 453 U.S. at 577. Under the Natural Gas Act, the sole avenue for review of Commission orders pertaining to interstate natural gas is in the United States courts of appeals. Section 19 of the NGA, 15 U.S.C. 717r; see Section 506 of the NGPA, 15 U.S.C. 3416; see also *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 334-336 (1958).

As a consequence of that statutory scheme and the filed rate doctrine, this Court has made plain that state courts, in the context of resolving actions filed under state law, lack authority to award damages that represent a change in the rate for natural gas approved by the Commission and provided for by Congress in the NGA or the NGPA. *E.g.*, *Arkla*, 453 U.S. at 578-579; *Montana-Dakota*, 341 U.S. at 251-252; see also *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986). As this Court stated,

> the mere fact that respondents brought this suit under state law would not rescue it, for when Congress has

---

[6] The "filed rate doctrine," as this Court has stated, generally "prohibits a federally regulated seller of natural gas from charging rates higher than those filed with the Federal Energy Regulatory Commission pursuant to the Natural Gas Act * * *." *Arkla*, 453 U.S. at 573.

> established an exclusive form of regulation, "there can be no divided authority over interstate commerce." *Missouri Pacific R. Co.* v. *Stroud*, 267 U.S. 404, 408 (1925). Congress here has granted exclusive authority over rate regulation to the Commission. In so doing, Congress withheld the authority to grant retroactive rate increases or to permit collection of a rate other than the one on file. It would surely be inconsistent with this congressional purpose to permit a state court to do through a breach-of-contract action what the Commission itself may not do.

Arkla, 453 U.S. at 580.

The principles outlined above confirm that in this case the New Mexico state courts, although empowered to award tort damages and damages for breach of contract under state law, had no authority to determine conclusively whether or not such a damages award was preempted by the NGA or the NGPA. To the contrary, only the Commission, subject to review by a federal court of appeals, may make that determination. For that reason, petitioner's contention that the prior state court judgment bound the court of appeals in its review of the Commission's declaratory order conflicts with the system of regulation established by the NGA and the NGPA.[7]

---

[7] Petitioner mistakenly relies (Pet. 12) on *Pan American Petroleum Corp.* v. *Superior Court of Delaware for New Castle County*, 366 U.S. 656 (1961). In that case, this Court held that the NGA did not preclude the state court from adjudicating "traditional common-law [contract] claims" involving the purchase of natural gas where "[n]o right is asserted under the Natural Gas Act." *Id.* at 663. And the Court made clear that that lawsuit did not involve any issue with respect to "the extent to which the Natural Gas Act reinforces or abrogates the private contract rights * * * in controversy." *Id.* at 664. Here, by contrast, the state court action plainly involved the ultimate federal question surrounding a recovery in excess of rates prescribed by federal law.

Similarly, petitioner's reference (Pet. 11) to a "head-on collision between the federal and state courts" in this case is misleading. Under a straightforward application of the filed rate doctrine, the court of appeals' judgment that federal law precluded the state court damages award means that the state court's contrary holding was preempted by federal law. This result would be clear if FERC had initially held that the state court judgment violated the filed rate doctrine and the court of appeals affirmed; the result should be no different simply because FERC initially reached a contrary conclusion and the court of appeals reversed. Accordingly, on remand from the decision below, the proceedings before the Commission will focus on Southern Union's claim for a refund of the damages award improperly collected by petitioner. See note 5, *supra*.

2. Petitioner also contends (Pet. 12) that the court of appeals' judgment conflicts with decisions such as *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462, 484 n.16 (1983), and *Allen* v. *McCurry*, 449 U.S. 90, 105 (1980). In those decisions, the Court reaffirmed the general principle that state courts may adjudicate federal constitutional and statutory claims. But that fundamental principle does not require a federal court to follow a prior state court judgment where, as here, such preclusive effect would be inconsistent with the statutory scheme Congress has enacted to govern the subject matter at issue—the regulation of proper rates charged for the sale of interstate natural gas. See, *e.g.*, *Brown* v. *Felsen*, 442 U.S. 127, 134-139 (1979); *Kalb* v. *Feurerstein*, 308 U.S. 433, 438-444 (1940); see *Marrese* v. *American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 386 (1985); Restatement (Second) of Judgments § 86 comment b (1982); cf. *Mississippi Power & Light*, 108 S. Ct. at 2440-2442; *A.L.T. Corp.* v. *Small Business Admin.*, 801 F.2d 1451, 1462-1463 (5th Cir. 1986).[8]

[8] For that reason as well, petitioner errs in contending (Pet. 12-13) that the court of appeals violated 28 U.S.C. 1738 and common law prin-

Indeed, were preclusive effect to be given to prior state court litigation (in which FERC would not be a party), the Commission would be forced continuously to monitor such proceedings and intervene in any private actions that raise claims that might affect FERC's regulatory jurisdiction over the sale of interstate natural gas. Congress clearly had no intention of adopting such an inefficient scheme that would frustrate the purposes of exclusive federal regulation by the Commission. Instead, application of the filed rate doctrine subject to the exclusive authority of the Commission, as reviewed only by the federal courts of appeals, ensures proper administration of the uniform regulatory scheme created by Congress.

3. Finally, petitioner suggests in passing (Pet. 16-17) that further review is necessary because this case presents an issue the Court reserved in *Arkla*, namely, "whether the filed rate doctrine applies in the face of fraudulent conduct." *Arkla*, 453 U.S. at 583 n.13. However, no such issue is presented by the record in this case. As the court of appeals recognized, "[t]he state [trial court] has found that Southern Union's conduct was negligent but not fraudulent." Pet. App. 12a; see *id.* at 91a. And although the New Mexico Supreme Court noted that the trial included "some evidence of actual or constructive fraud," *id.* at 77a, that court also observed that

---

ciples of res judicata, which ordinarily would have applied and required it to follow the prior state court judgment. See, *e.g.*, *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461, 466-468 (1982); see generally 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4470 (1981 & Supp. 1989). In any event, inasmuch as FERC was not a party to the New Mexico state court litigation, principles of res judicata could not bar the court of appeals from de novo consideration of the Commission's declaratory order. See, *e.g.*, *Allen* v. *McCurry*, 449 U.S. 90, 94-95 (1980); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Found.*, 402 U.S. 313, 329 (1971).

the trial court "did not find that Consolidated had proved fraud by clear and convincing evidence as required by law," *ibid.* Accordingly, this case does not present an occasion for the Court to address the issue left unresolved in *Arkla*.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

WILLIAM C. BRYSON
*Acting Solicitor General**

DAVID N. COOK
Acting General Counsel

JEROME M. FEIT
Solicitor

SAMUEL SOOPPER
Attorney
Federal Energy Regulatory Commission

JANUARY 1990

---

[9] In any event, petitioner has not sought certiorari on that question. See Pet. i; Sup. Ct. R. 14.1(a).

Petitioner also suggests (Pet. 15-16) that the court of appeals' failure to defer to the Commission's decision calls for this Court's review. Apart from the fact that petitioner has not sought certiorari on that question, further review is plainly not warranted where, as here, the Commission has decided to accept the court of appeals' judgment regarding the application of the filed rate doctrine and *Arkla* to the particular facts of this case.

* The Solicitor General is disqualified in this case.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—262-203/00722

No. 89-911 (4)

Supreme Court, U.S.
FILED
JAN 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CONSOLIDATED OIL & GAS, INC.,
Petitioner,

v.

SOUTHERN UNION COMPANY

and

FEDERAL ENERGY REGULATORY COMMISSION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF FOR PETITIONER

ALLEN R. SNYDER
WALTER A. SMITH, JR.*
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5728

RICHARD G. MORGAN
JAMES L. MARKETOS
LANE & MITTENDORF
919 18th Street, N.W.
Washington, D.C. 20006
(202) 785-4949

* Counsel of Record

Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
DISCUSSION	1
CONCLUSION	10

TABLE OF AUTHORITIES

Cases	Page
Arkansas Louisiana Gas Co. v. *Hall*, 453 U.S. 571 (1981)	2, 3, 4
Atlantic Coast Line R.R. v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970)	3, 9
Brown v. *Felsen*, 442 U.S. 127 (1979)	6
Charles Dowd Box Co. v. *Courtney*, 368 U.S. 502 (1962)	3
City of Tacoma v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958)	2
Clafin v. *Houseman*, 93 U.S. 130 (1876)	3
Consolidated Oil & Gas, Inc. v. *FERC*, 806 F.2d 275 (D.C. Cir. 1986)	5
District of Columbia Court of Appeals v. *Feldman*, 460 U.S. 462 (1983)	9
England v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964)	7, 8
Gulf Offshore Co. v. *Mobil Oil Corp.*, 453 U.S. 473 (1981)	3
Hathorn v. *Lovorn*, 457 U.S. 255 (1982)	3
Kalb v. *Feurerstein*, 308 U.S. 433 (1940)	6
Mansfield, C. & L.M. Ry. v. *Swan*, 111 U.S. 379 (1884)	4
Mississippi Power & Light Co. v. *Mississippi*, 108 S.Ct. 2428 (1988)	3
Nantahala Power & Light Co. v. *Thornburg*, 476 U.S. 953 (1986)	4
New Orleans Public Service, Inc. v. *Council of New Orleans*, 109 S.Ct. 2506 (1989)	4
Pan American Petroleum Corp. v. *Superior Court of Delaware*, 366 U.S. 656 (1961)	3, 4
Pratt v. *Paris Gas Light & Coke Co.*, 168 U.S. 255 (1897)	3
Rooker v. *Fidelity Trust Co.*, 263 U.S. 413 (1923)	9
Transcontinental Gas Pipe Line Corp. v. *State Oil & Gas Board*, 474 U.S. 409 (1986)	3
United States v. *Corrick*, 298 U.S. 435 (1936)	4

TABLE OF AUTHORITIES—Continued

Statutes Page

28 U.S.C. § 1738 (1982) ..... *passim*
Natural Gas Act of 1938, 15 U.S.C. §§ 717-717z (1988) ..... *passim*
Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432 (1988) ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-911

CONSOLIDATED OIL & GAS, INC.,
Petitioner,

v.

SOUTHERN UNION COMPANY

and

FEDERAL ENERGY REGULATORY COMMISSION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

Notwithstanding the conflicting judgments issued by the D.C. Circuit and the New Mexico Supreme Court in this case, Southern urges this Court not to resolve the conflict. It says the writ should be denied for essentially three reasons: (1) even though Southern expressly requested the state courts to decide the preemption question, it now says those courts had *no jurisdiction* over that question and the D.C. Circuit was therefore authorized to redetermine it; (2) Southern furthermore says that it "reserved" its "right" to *relitigate* the preemption question in the federal courts; and (3) Southern says that there is in any event no need for this Court to resolve the contradictory commands of the D.C. Circuit and the New Mexico Supreme Court; instead, says Southern, because a Colorado bankruptcy court happens fortuitously to be reviewing Consolidated's unrelated, pending bankruptcy petition, this case can be "adjudicated to

a conclusion" in that court once FERC issues a refund order carrying out the D.C. Circuit's decision.

Surprisingly, FERC also urges that the petition be denied, even though its orders have been overturned by the D.C. Circuit. Reversing itself both on the merits of the underlying preemption question as well as on the jurisdiction of the state courts to resolve that question, FERC joins Southern in contending that only FERC itself, subject to review by the federal courts, had authority to determine the preemption question.

None of the arguments now advanced by Southern and FERC are right.[1] But more significantly, those arguments do not and cannot answer the most compelling reason for certiorari in this case—to resolve the outstanding, contradictory judgments of the New Mexico Supreme Court and the D.C. Circuit. A denial of certiorari will *not* resolve that contradiction. Instead, it will simply leave the D.C. Circuit's orders standing, just as this Court's denial of certiorari to the New Mexico Supreme Court left that court's orders standing. Both courts' orders cannot be right and, more importantly, both *cannot be obeyed.* Only this Court has jurisdiction over both courts, and only a decision by this Court can now determine which court's orders should be followed.

1. Neither FERC nor Southern cites any authority for their contention that federal agencies and the federal

---

[1] Both FERC and Southern also argue the merits of the underlying preemption/*Arkla* issue in their Oppositions, and imply that our petition is weakened by our failure to raise that question before this Court. FERC Opposition ("Opp.") 11 n.9; Southern Opp. 15 n.14. But that is not so. While we strongly believe the New Mexico Supreme Court correctly resolved that question, our position is that neither the D.C. Circuit—nor even this Court—had authority to redetermine that question after the New Mexico court's judgment became final. It was for *that* reason we did not raise the question in our petition. *See, e.g., City of Tacoma* v. *Taxpayers of Tacoma,* 357 U.S. 320, 334 (1958) ("obviously [a lower] court, *like this one,* may not . . . re-examine and decide a question which has been finally determined by a court of competent jurisdiction in earlier litigation between the parties") (emphasis supplied).

courts have exclusive jurisdiction to decide federal preemption questions. That is because there is none. It has long been settled that state and federal courts have *concurrent* jurisdiction to decide *all* federal issues, unless Congress has expressly provided to the contrary.[2] While it is true that "Congress . . . has granted exclusive authority over [natural gas] rate regulation to [FERC]," *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 580 (1981) (*"Arkla"*), Congress has *not* granted exclusive authority to the federal courts to decide whether the existence of FERC's regulatory authority precludes various state causes of action.

Thus, as this Court held in *Pan Am. Petroleum Corp.* v. *Superior Court of Delaware*, 366 U.S. 656 (1961), the Natural Gas Act does *not* oust the state courts from deciding the extent to which that federal Act governs or precludes state causes of action concerning regulated gas; for the Act itself nowhere "deprive[s] the state courts of the power to determine *questions* arising under the [Act] . . . ."[3] Indeed, the proposition that state courts may decide preemption questions raised by FERC's regulatory authority is so well settled that this Court has recently decided at least four such questions coming from state supreme courts—including the *Arkla* case itself—and in *none* of those cases was the issue of the state courts' jurisdiction over the questions even mentioned.[4] Even so,

---

[2] *See, e.g., Hathorn* v. *Lovorn*, 457 U.S. 255, 266-67 (1982); *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981); *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 507-09 (1962); *Clafin* v. *Houseman*, 93 U.S. 130, 136-37 (1876).

[3] *Id.* at 664 (quoting *Pratt* v. *Paris Gas Light & Coke Co.*, 168 U.S. 255, 259 (1897) (emphasis in original)). *Accord Atlantic Coast Line R.R.* v. *Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 294-96 (1970) (state court has concurrent jurisdiction to decide federal preemption question); *see Hathorn* v. *Lovorn*, 457 U.S. at 266 & n.18 ("even a finding of exclusive federal jurisdiction over claims arising under a federal statute usually 'will not prevent a state court from deciding a federal question collaterally' ") (quoting *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. at 483 n.12).

[4] *Mississippi Power & Light Co.* v. *Mississippi*, 108 S.Ct. 2428, 2438 n.11 (1988); *Transcont. Gas Pipe Line Corp.* v. *State Oil &*

the fact that this Court entertained the preemption question in all those cases necessarily constituted a determination that the state courts had jurisdiction to decide such questions.[5]

Southern's and FERC's current arguments to the contrary are all based on their confusion of FERC's exclusive jurisdiction over interstate natural gas prices with the federal and state courts' concurrent jurisdiction to decide other federal questions arising under the NGA and NGPA. Obviously, it is one thing to say that FERC has exclusive jurisdiction over interstate gas rates; it is something quite different to say that FERC has exclusive jurisdiction to determine whether the existence of its regulatory authority precludes a particular state cause of action.

Notwithstanding what they now contend, Southern and FERC do understand the distinction between these two kinds of jurisdiction. As Southern expressly argued to the New Mexico courts when it urged those courts to decide the preemption question in its favor, "this Court and FERC have *concurrent* jurisdiction over the regulatory issues in this case . . . ."[6] Yet, having lost those

---

Gas Bd., 474 U.S. 409, 414-15 (1986); *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 961 (1986); *Arkla*, 453 U.S. at 575. *See also New Orleans Pub. Serv., Inc.* v. *Council of New Orleans*, 109 S.Ct. 2506, 2521 (1989) (Rehnquist, C.J., concurring in part in opinion and concurring in judgment) (state may empower its courts to decide FERC-related federal preemption claims).

[5] This Court has long recognized that in every case coming before it, the Court must first determine its own jurisdiction, and that the Court has no jurisdiction to decide the merits of any question the lower court had no jurisdiction to decide. *See United States* v. *Corrick*, 298 U.S. 435, 440 (1936); *Mansfield, C. & L.M. Ry.* v. *Swan*, 111 U.S. 379, 382-83 (1984).

[6] Southern's Reply Brief in Support of Motion to Stay Proceedings at 19 (emphasis supplied). Indeed, Southern stated to the New Mexico trial court that it "accepts the *Pan American* court's decision" that the state court has jurisdiction to decide the FERC-related issues in this case and "does not question the jurisdiction of this Court to proceed with [those issues] . . . ." *Id.* at 15.

issues before the state courts, Southern now claims that those courts had no jurisdiction to decide them. The claim is not only flatly contrary to Southern's and FERC's position before the state courts,[7] but, as we have shown, it is also clearly wrong.[8]

---

[7] Before the state courts, FERC declined to take jurisdiction over all issues related to the interstate gas contracts at issue, stating:

> [W]e see no reason to exercise jurisdiction over the contractual aspects of this case. As in *Arkla* v. *Hall*, the favored nations clauses in the Consolidated contracts do not require special expertise for their construction; there is no need for uniformity of construction; *and the case is not important to the regulatory responsibilities of the Commission.* [App. 23a; emphasis supplied.]

Now, however, FERC says that if the Commission itself does not rule on *all* such issues in *all* such cases, it "would frustrate the purposes of exclusive federal regulation." FERC Opp. 10. FERC never explains why that would be so nor why it has totally reversed its position on the issue.

[8] Lacking legal authority for its claim that FERC and the federal courts have exclusive jurisdiction over preemption questions, Southern relies on this statement from our D.C. Circuit rehearing petition: "FERC's determination of the federal preemption issues is conclusive . . . ." Southern Opp. 18 (quoting Rehearing Petition at 14). As Southern knows, this statement was contained in our argument concerning the deference owed to FERC's view of its own jurisdiction. Our argument was that FERC's view on the preemption issue should have been treated as conclusive by any court deciding the issue; we certainly did not argue that no state court had jurisdiction to decide the issue at all.

Southern also seeks to support its exclusive jurisdiction argument by noting that, at the time FERC declined to express a view on the preemption issue, it reserved the right to do so at a later time, Southern Opp. 18-19 (citing App. 23a-24a), and that this "reservation" was affirmed by the D.C. Circuit in a decision reached before the New Mexico Court ruled on the merits of the preemption issue. Southern Opp. 19-20 (citing *Consol. Oil & Gas, Inc.* v. *FERC*, 806 F.2d 275 (D.C. Cir. 1986)). It is difficult to see how this supports Southern's argument. Nothing in FERC's orders or the D.C. Circuit's first decision even remotely supports the proposition that FERC's undoubted jurisdiction to speak on the preemption issue is *exclusive*.

Furthermore, it is difficult to see a principled stopping place for the rule now espoused by FERC and Southern. Virtually every federal agency has exclusive authority to perform some responsibility under its enabling statute. Under FERC's and Southern's current approach, the jurisdiction of state courts to decide *any* issues arising under any such statute would be in serious doubt, so long as the issues were related in any way to the agency's exclusive authority.[9] Such a wholesale deprivation of state-court jurisdiction cannot be squared with the authority and competence of state courts to decide federal issues, with anything in the NGA, NGPA, or similar statutes,[10] or with the contrary command of 28 U.S.C. § 1738. It should not be condoned by this Court.

2. Equally unsound and just as contradictory to Southern's previous position is its current claim that it "re-

---

[9] FERC contends that this must be so, for otherwise the agency would be required "to . . . intervene in any private actions that raise claims that might affect FERC's regulatory jurisdiction . . . ." FERC Opp. 10. But this is clearly not so. Obviously, state and federal courts often decide agency-related issues in cases where the agency itself is not a party; and in all such cases, the doctrines of agency deference and primary jurisdiction assure that the agency's views and prerogatives are given due weight.

Alternatively, FERC insists that because it was not a party to the New Mexico court proceedings, res judicata principles did not apply to *it* in the D.C. Circuit proceedings. FERC Opp. 9 n.8. But the fact that FERC was not nominally a party until the D.C. Circuit proceedings is irrelevant. What matters is that in state litigation between Southern and Consolidated a final judgment determined that Consolidated's tort action was not preempted. The D.C. Circuit was not free to overturn that judgment simply because FERC was added as a party to the federal proceeding.

[10] Since there is nothing in the language or legislative history of the NGA or NGPA to support its current exclusive-jurisdiction claim, FERC cites two instances under the federal bankruptcy laws where Congress did in fact exclude state courts from litigating certain issues within the peculiar expertise of the bankruptcy courts. FERC Opp. 9 (citing *Brown* v. *Felsen*, 442 U.S. 127 (1979); *Kalb* v. *Feuerstein*, 308 U.S. 433 (1940)). Nothing comparable to those specialized situations is presented here.

served its right" to litigate the preemption question in the federal courts. Southern Opp. 22. Southern most certainly did not "reserve" that right. Instead, it fully and voluntarily litigated the preemption question up through the New Mexico Supreme Court and, when it lost there, unsuccessfully sought certiorari from this Court. In such circumstances, both this Court's decisions and 28 U.S.C. § 1738 precluded Southern from relitigating the question in the D.C. Circuit—and likewise precluded the D.C. Circuit from redeciding that question. *See* Petition for Certiorari ("Pet.") 12-15. In order to advance its current, contrary view, Southern distorts the record,[11] ignores 28 U.S.C. § 1738, and completely misreads this Court's decision in *England* v. *Louisiana State Bd. of Med. Examiners*, 375 U.S. 411 (1964).

---

[11] Southern implies that the New Mexico courts forced it to litigate its preemption claim in both the state and federal courts. Thus, it contends that "it was the New Mexico courts' . . . refusal to stay their proceedings and judgments pending the outcome of this federal proceeding, and the New Mexico Supreme Court's decision to rely on the FERC's order (when review of that order was pending in the D.C. Circuit)—that gave rise to the duplicative litigation" in this case. Southern Opp. 28 n.26. This is wholly incorrect for several reasons.

First, and most important, Southern fully and *voluntarily* presented its preemption question to the state courts; it could have reserved that question for presentation to the D.C. Circuit, but it did not do so. Second, it is unseemly at best for Southern to fault the New Mexico Supreme Court for ruling on the preemption issue while FERC's orders were on appeal to the D.C. Circuit, given that Southern expressly asked the court to do so. Third, the only stay of proceedings Southern ever sought from the state courts was that those courts should await FERC's view on the preemption question before ruling on that question themselves. This the state courts did. Finally, Southern's claim that the New Mexico courts should have stayed their judgments while Southern attempted to collaterally attack them in the federal courts not only has no legal basis, but it ignores the true cause of the "duplicative litigation" that resulted. The cause was certainly not the New Mexico courts' refusal to stay their judgments; it was Southern's attempts to collaterally attack those judgments in the D.C. Circuit.

In *England*, this Court held that, when a federal district court has abstained in a proceeding and has relegated a party to the state courts, that party may nevertheless litigate his federal claims in the federal court by informing the state courts "what his federal claims are" and that he "intends . . . to return to the District Court for disposition of his federal contentions." 375 U.S. at 420, 421. Alternatively, the party may "submit his entire case to the state courts, relying on the opportunity to come [to the Supreme Court] if the state decision on his federal claims should go against him." *Id.* at 418. But if he does the latter, *i.e.*, if he "unreservedly litigate[s] his federal claims in the state courts although not required to do so," he cannot "ignore the adverse state decision and start all over again in the District Court." *Id.* at 419.

Southern now says it *is* entitled to start all over again in the federal courts because it "reserved" the "right" to do so; that is, Southern says that because it told the New Mexico Supreme Court that it intended to relitigate its federal claim in the federal courts if it lost in the state courts, it has a right to do so under *England*. This is surely not a serious contention.

The rationale of *England* was to preserve a party's choice to litigate his federal claims in federal court *rather than* state court. It was certainly not a holding that all parties who wish to litigate in federal court after losing in state court acquire a "right" to do so simply by announcing to the state court that that is their intention. Such a rule would render *all* state court resolutions of federal questions advisory opinions subject to redetermination in federal courts. It would furthermore make nonsense of the concept of concurrent state and federal jurisdiction over federal issues, would completely eviscerate well-established principles of comity and federalism, would violate the command of 28 U.S.C. § 1738, and would contradict this Court's repeated holdings that federal courts have *no jurisdiction* to review final state court

judgments.[12] Southern's claim that such a rule is the law and justifies the D.C. Circuit's decision has no merit whatever.

3. While we believe the fundamental issues of federal/state court jurisdiction, comity, and federalism raised by this case all merit this Court's review, the most compelling reason warranting certiorari in this case remains the "head-on collision" between the federal and state court systems. *See* Pet. 11-12. Significantly, FERC and Southern have no remedy for this collision. Instead, they simply assume that the D.C. Circuit's judgment will be followed in preference to the New Mexico Supreme Court's judgment.[13]

Thus, Southern says that once certiorari is denied, FERC will issue a refund order against Consolidated and the matter then "can be adjudicated to a conclusion" in the Colorado bankruptcy court. Southern Opp. 29. By this, Southern clearly means that the bankruptcy court should simply carry out the D.C. Circuit's judgment; Southern has in fact already informed the former court that it is "bound to follow the D.C. Circuit decision."[14] But it has never informed that court—or this Court—how the parties or the lower courts are to choose between the final, contradictory judgments of the D.C. Circuit and the New Mexico Supreme Court.

Similarly, FERC says that "[u]nder a straightforward application of the filed rate doctrine, the court of appeals' judgment that federal law precluded the state court damages award *means that the state court's contrary hold-*

---

[12] *See District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462, 476, 482 (1983); *Atlantic Coast Line R.R.*, 398 U.S. at 296; *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 415-416 (1923).

[13] Illustrative of Southern's confidence on this point is the startling admission in its Opposition that "[b]ecause of the D.C. Circuit's decision," it has "decided *not to pay*" the interest on the outstanding tort judgment *ordered* by the New Mexico Supreme Court. Southern Opp. 13 n.13 (emphasis supplied).

[14] Southern's Answer and Counterclaim ¶ 20 (Bankr. D. Colo.) (filed January 2, 1990).

ing was preempted by federal law." FERC Opp. 9 (emphasis supplied). But of course it means no such thing; rather, FERC has simply confused, again, the fact that certain state-law causes of action may be preempted by federal law with the fact that state courts have concurrent jurisdiction to determine whether such preemption has occurred.

The New Mexico Supreme Court determined in this case that such preemption did not occur. The lower federal courts—including the D.C. Circuit—have no authority to sit in review of such state court judgments and thereby "preempt" them. Only this Court may do that, and it chose not to do so when it denied certiorari to the New Mexico Supreme Court. Nevertheless, the D.C. Circuit has chosen to redetermine the very federal question this Court chose not to review, and the result of that choice has been to put the two lower courts at loggerheads and to subject the parties to two contradictory judgments. Only this Court has jurisdiction to resolve the contradiction and to extricate the parties and the lower courts from this untenable impasse.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

ALLEN R. SNYDER
WALTER A. SMITH, JR.*
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5728

RICHARD G. MORGAN
JAMES L. MARKETOS
LANE & MITTENDORF
919 18th Street, N.W.
Washington, D.C. 20006
(202) 785-4949

* Counsel of Record

Counsel for Petitioner